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1098

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United States
1098
Circuit Court of Appeals

For the Ninth Circuit.

Apostles on Appeal.
(IN TWO VOLUMES.)

**SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY, a Corporation, Owner of the
American Steamship "BEAVER,"**

Appellant,

vs.

**LEGGETT STEAMSHIP COMPANY, a Corpora-
tion, Claimant of the Steam Schooner "NE-
CANICUM," Her Engines, Boilers, Boats,
Tackle, Apparel and Furniture,**

Appellee.

VOLUME II.
(Pages 385 to 825, Inclusive.)

**Upon Appeal from the Southern Division of the United States
District Court for the Northern District of California,
First Division.**

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(Testimony of Joseph W. Ettershank.)

Q. And you gave full speed astern and were turning full speed astern during all that time, were you not? A. Yes, sir.

Q. And you turned about 4 points before you hit her, did you not? A. Somewheres around there.

Q. More than three, was it not?

A. I don't know; I don't recollect now.

Q. Your recollection is that it was around 4, is it not? A. I could not say; I don't know.

Mr. CAMPBELL.—It seems to me, if the Court please, if we are going to inquire into the “Beaver”—“Selje” collision the proper way to do is to ask the witness whether or not he testified to certain facts, whether he answered a certain question thus and so, and if necessary, show it to him.

Mr. DENMAN.—I am inquiring of him as to the conduct of the vessel under similar circumstances.

The COURT.—It is not a question so much what he testified to before as it is what he knows about it.

Mr. CAMPBELL.—But he is asking him about what happened on the occasion of the prior collision. That is not before this Court.

The COURT.—Yes, he is asking him about that, under somewhat similar circumstances. [325]

Mr. DENMAN.—Q. You remember she swung over a good deal in that minute, don't you?

A. Yes, sir.

Q. You don't think she swung as far on this occasion, do you, under the same circumstances?

A. No, sir.

Q. That is your opinion, is it?

A. She did not, no, sir.

(Testimony of Joseph W. Ettershank.)

Q. Do you remember in the case of the "Beaver" that although she had swung over 4 points that you rammed the "Selje" 22 feet on one side and 15 on the other, or thereabouts? That is to say, the scars on your ship were 22 feet on one side and about 15 on the other. That is correct, is it not?

A. I don't remember that.

Q. How far did you go into the "Selje"?

A. We cut a considerable distance into her.

Q. Well, 15 or 20 feet, was it not?

A. Yes, around there.

Q. Do you remember how your helm was when you were approaching the "Selje"? A. Aport.

Q. The same as it was on this occasion?

A. Yes, sir.

Q. Hard aport on both occasions? A. Yes, sir.

Q. That all appears in the testimony in the case that was heard there, does it not?

A. Yes, sir, that is in the testimony.

Q. It was a matter of public knowledge then after the case was tried?

Mr. CAMPBELL.—A matter of public knowledge?

Mr. DENMAN.—Yes. It is in the records of of this Court. I have the record from the Court of Appeals.

Q. What angle did you say the two vessels came together at, if you recall?

A. Pretty near right angles.

Q. About 45 degrees? A. Yes, sir.

The COURT.—Q. What is this notion of 45 de-

(Testimony of Joseph W. Ettershank.)

grees being a right angle? A. Sir? [326]

Q. I say, what is this notion of 45 degrees being a right angle? Is it your idea that 45 degrees constitute a right angle? A. Yes, sir.

Mr. DENMAN.—Q. That is to say, they were coming at about that angle, about 45 degrees on?

A. Yes, sir, something like that (illustrating).

Q. Put your hands the way you had them when you were showing me, just when you made the last illustration. That is about it, is it (showing drawing in note-book)? A. Yes, sir.

Mr. CAMPBELL.—Why don't you let the witness take the two models, Mr. Denman, and show you by them?

Mr. DENMAN.—Well, this will do.

Q. After they struck, as I understand it, the "Necanicum" immediately swung around until she was about parallel to you? A. Yes, sir.

Q. How far was her bridge abaft of you when you talked to the captain, or to whoever came over to the edge of the bridge. A. Pretty near abeam.

Q. Pretty near on your beam?

A. Yes, sir, abreast of our bridge.

Q. Abreast of your bridge? A. Yes, sir.

Q. At that time had they turned around so that they were parallel to you? They were drawing astern from you then, were they not? A. Yes, sir.

Q. Where is your bridge?

A. Right back of the foremast.

Q. Where is the "Necanicum's" bridge?

A. Abaft of the mainmast.

(Testimony of Joseph W. Ettershank.)

Q. Pretty near astern, is it not? A. Yes, sir.

Q. Her bridge must have been considerably abaft yours when this maneuver was through?

A. Well, I did not take particular notice how much astern she was, but she was pretty near abeam, as I recollect it now. [327]

Q. Did he yell down across to you?

A. Yes, sir.

Q. Was it down the length of his ship to you or was it off the side of his vessel? A. Off the side.

Q. Angling down the starboard side?

A. He was on the starboard side of his vessel, yes, sir.

Q. What angle was he from you at that time?

A. The ships were more this way then. They were pretty near parallel to each other.

Q. This is the log, is it, Mr. Ettershank (showing)? A. Yes, sir.

Mr. DENMAN.—I will have this marked for identification Claimant's Exhibit "B." I will offer it in evidence.

(The document was here marked Claimant's Exhibit "B.")

Q. You are quite sure you did not make any changes in this log regarding the fog, but you did change the entry about the mile? A. Yes, sir.

Q. Here is a fog entry, and here is a fog entry, and here is a fog entry; there were not any changes made in those? A. No.

Q. Those are just the way you originally wrote them?

(Testimony of Joseph W. Ettershank.)

A. Yes. And this I did not have room for the miles and I just rubbed it out and put that one in there.

Q. There is no change about the drifting fog?

A. No.

Q. And no change on the 2:14 P. M.? A. No, sir.

Q. You swear you did not write that first 2:16?

A. I did not.

Q. How did it come to be written 2:16 underneath the 2:14? You might have made a mistake on that and changed it? A. No.

Q. Just look at the 6 under the 4; don't you see it?

A. No, sir. [328]

Q. Don't you see the mark of the rubber there?

A. No, sir.

Q. Well, it will be in evidence. That is all.

Redirect Examination.

Mr. CAMPBELL.—Q. I ask you whether or not it is a fact that at the time of the impact between the two vessels in the “Beaver”—“Selje” collision the “Beaver's” engines were working full speed ahead under a hard aport helm. A. No.

Q. What was your testimony in that case?

A. You mean at the time of the “Beaver”—“Selje” collision?

Q. At the time of the actual impact, how was your vessel then working?

A. As soon as they spotted her the captain went full speed astern and held her hard aport to make her swing.

(Testimony of Joseph W. Ettershank.)

Q. At the moment of impact how were the engines working on the "Beaver"?

A. The captain reversed them so as to keep her nose into her so as to see if he could keep her up, if I remember right.

Q. Well, all right, we will look into that.

Mr. DENMAN.—I have the record here, Mr. Campbell, if you want it.

Mr. CAMPBELL.—I will look into that.

Q. I ask you to look at this log carefully and tell us whether or not there have been any changes here to which Mr. Denman has referred, and if there have been, I want them fully explained to the Court.

A. There is one change there. We can mark it there.

Q. I don't want it marked.

A. I had wrote ahead, about a mile, and I seen the mistake and I rubbed it out and put one there and put the word mile afterwards.

Q. Where is the 2:16?

A. That is right here. That might be a blur from the writing over here; I don't know. [329]

Q. I will ask you whether or not there has been any change here on "drifting fog."

Mr. DENMAN.—He just swore there had not been.

Mr. CAMPBELL.—I am simply after the truth about it.

A. It has been erased there.

Q. Did you make the change?

A. It is my writing, yes, sir.

Q. If there is any change made there who made it?

(Testimony of Joseph W. Ettershank.)

A. Myself.

Q. What was there there before?

A. I don't recollect.

Q. Is there a change over here, under the item "2:25, thick fog"?

A. I might have had my pencil wet and I might have wrote thicker.

Mr. CAMPBELL.—Mr. Denman, what other changes are there in the log that you think has been made?

Mr. DENMAN.—Really I don't recall what I called his attention to.

Mr. CAMPBELL.—I will hand it to you so you may ascertain.

Mr. DENMAN.—I don't know what these changes were. There have been some erasures.

Mr. CAMPBELL.—Point them out please so that we may have them explained, if they can be explained.

Mr. DENMAN.—I think you can take it and find them.

Mr. CAMPBELL.—Are there others there that you now see, so that we can have an opportunity to explain them? In common fairness, Mr. Denman, will you point them out to us so we can make an explanation if the witness can explain them.

Mr. DENMAN.—Here is one.

Mr. CAMPBELL.—Q. "Automatic whistle was blowing regularly but no whistle was heard from 'Necanicum' until after second passing signal had been blown."

(Testimony of Joseph W. Ettershank.)

Mr. DENMAN.—There have been some changes there. You can see from an inspection of it just where the changes have been. [330]

Mr. CAMPBELL.—Q. I will ask you whether or not there has been any change or any erasure in what I just read, beginning with the words “Automatic whistle was blowing regularly,” and so forth, down to the words “had been blown”?

A. Not that I recollect of.

Q. I want you to look at it, and if there is, I want you to explain it.

A. Not that I know of, no, sir.

Mr. CAMPBELL.—Were those the only changes, Mr. Denman, that you found?

Mr. DENMAN.—All that I think of now. I think there are 5 or 6.

Mr. CAMPBELL.—Do you care to examine it further so we can make an explanation of it? Do you wish to do that in common fairness to us?

Mr. DENMAN.—You have it right in your possession yourself. I don't recall any others at the present time.

Mr. CAMPBELL.—All right. That is all. [331]

Testimony of J. F. Clemens, for Claimant.

J. F. CLEMENS, called for the claimant Leggett Steamship Co., sworn.

Mr. DENMAN.—Q. Mr. Clemens, how long have you been at sea? A. About 27 years.

Q. In what waters?

A. Mostly on the Pacific Ocean.

(Testimony of J. F. Clemens.)

Q. For how long have you had officer's papers?

A. I have had officer's papers for over 20 years—about 20 years.

Q. What position did you hold on the "Necanicum" at the time of her collision with the "Beaver"?

A. Second officer.

Q. How long had you been on the "Necanicum"?

A. For about two months prior to that time.

Q. About two months? A. Yes.

Q. Where were you at the time of the collision?

A. I was on the quarter deck, the port side.

Q. Where had you been before that?

A. I had been lying down, I was in bed.

Q. How long before the collision did you come up?

A. I guess about a minute and a half.

Q. You think about a minute and a half before the collision? A. Yes.

Q. What was the occasion of your coming up?

A. I came up when I heard the mate stamp above me on the deck, a signal for me to get out on deck as quick as I could.

Q. Where did you hear this signal from?

A. From over my head, from the hurricane deck.

Q. On which side was your stateroom?

A. On the port side.

Q. I want to ask you with reference to the "Necanicum," whether that is a photograph of her.

A. Yes.

Q. I will ask you whether at the time of the collision there was any house on top of the deck-house,

(Testimony of J. F. Clemens.)

whether the captain's quarters are shown on this photograph. [332] A. No.

Q. They are not? A. No.

Q. The stack was there? A. Yes.

Mr. CAMPBELL.—Haven't you a photograph showing the damages and showing the house?

Mr. DENMAN.—It does not show the whole hull; it does not show the hull portion of it as I recall it.

Q. How about the arrangement of the boats as they appear in this photograph and as compared with the condition at the time of the collision?

A. They were about the same.

Q. About the same?

A. Yes, I see nothing different.

Q. Now, when you came out on deck, what direction did you first look in?

A. I looked ahead, sir; I looked ahead from the port side on the quarter-deck.

Q. Did you see anything?

A. I could see nothing at first.

Q. What was the condition of the weather?

A. It was foggy.

Q. Did you at any time see the "Beaver" prior to the collision? A. Yes.

Q. Where did you see it?

A. Bearing down on the starboard bow.

Q. Whereabouts across your vessel did you see it?

A. Across a little abaft the forecastle-head from where I was standing, on the after house—at the after quarter-deck.

What happened then? A. When I saw her?

(Testimony of J. F. Clemens.)

Q. Yes.

A. I let go of the log line, I had taken hold of it to take it in, and I let it go and grabbed the stanchion to hold myself from being knocked down.

Q. Were you knocked down?

A. No; I grabbed the stanchion to hold myself.

Q. What happened to your vessel when she was struck? Did she [333] swing in any direction?

A. Yes.

Q. What direction? A. She swung to port.

Q. How hard was the blow?

A. Well, it was pretty hard, a pretty hard blow.

Q. Did the "Beaver" have way on when she struck you? A. Yes.

Q. How much?

A. Well, I could not say that she had so very much headway on; she had some headway, all right.

Q. How much would you say?

A. I should judge she had four or five miles an hour.

Q. I want to ask you what direction did she go from you after the collision?

A. She shot right on past us, passed right across the bow.

Q. And you say you were turned to the port?

A. We turned to port, yes, she knocked her around when she hit her bow, she knocked her around.

Q. I will ask you whether or not this photograph shows the condition of the "Necanicum's" bow.

A. Yes.

Q. As a result of the collision?

(Testimony of J. F. Clemens.)

A. Yes, that shows the damage very clearly.

The COURT.—That reminds me; are you going to introduce that photograph in evidence of the “Necanicum,” the first one?

Mr. DENMAN.—I am going to introduce one now. I will introduce that after this so that we can identify it.

Q. I offer you this photograph, which I will call Claimants’ Exhibit “C,” and ask you whether that represents the condition of the “Necanicum” after the collision, with reference to the damage to her bow. A. Yes, it does.

Q. I ask you whether or not the port anchor was driven in against the side of the ship as shown in that picture. A. Yes.

Q. Is the same true of this picture, which we will call Claimant’s [334] Exhibit “D”? A. Yes.

Mr. CAMPBELL.—May I see them before they are marked?

Mr. DENMAN.—Yes. There is Exhibit “C” and Exhibit “D.”

Q. Was there any injury to the anchor on the starboard side? A. No.

Q. I ask you whether this photograph, which we will call Claimants’ Exhibit “E,” is a photograph of the “Necanicum.” A. Yes.

Q. I ask you whether this photograph shows the addition of the captain’s room on top of the deck-house. A. Yes.

Q. Since the time of the collision?

A. Since the time of the collision, yes.

(Testimony of J. F. Clemens.)

Mr. CAMPBELL.—I think it would be well to mark that so we will know what it is. Haven't you any photograph of her as she was at that time?

Mr. DENMAN.—No, I have not. I now offer it in evidence, together with the others.

Q. Now, I offer you an exhibit which I am about to offer, as Exhibit "F," and ask you whether or not that is a photograph of the "Necanicum" looking from the forecastle aft. A. Yes.

Q. This has been taken since the house was added to the top of the deck-house, has it not?

A. Well, I can't see the house there—yes, sure, it is. I can see it now.

Mr. DENMAN.—I offer this in evidence.

Q. What was done, if anything, with regard to the engines on your vessel prior to the collision?

A. They were backing.

Q. Were they backing when you left your room?

A. They were backing before I left my room.

Q. How do you know they were backing?

A. I could tell by the vibration of the ship that they were reversing. [335]

Q. You say that you had started in to haul the log line just before the collision? A. Yes.

Q. In what direction was the log line pointing?

A. Leading forward of the beam, leading forward.

Q. How long was it before the other vessel disappeared in the fog after the collision?

A. It was a very short while; it was in sight but a very little while before it disappeared.

(Testimony of J. F. Clemens.)

Q. Did she ever come back and ask you if you needed assistance? A. No.

Cross-examination.

Mr. CAMPBELL.—Q. You are leaving town to-day, are you, Mr. Clemens? A. Yes.

Q. What vessel are you going to take a position on? A. On the “Hubbard.”

Q. A steamer of the Hammond Lumber Company? A. Yes.

Q. The same people that own the “Necanicum”? A. Yes.

Q. Did you hear the one blast passing whistle blown by the “Beaver”?

A. No, I did not. I didn’t hear any whistles the “Beaver” blowed, and if there were I could not hear them; I could not distinguish them from my room on the port side, it would make it difficult to hear.

Q. Did you hear a one blast passing whistle blown by your steamer? A. No.

Q. You did not? A. No.

Q. You did not hear a one-blast passing whistle blown by your steamer? A. No.

Q. Didn’t you discuss with Captain Keegan after this collision the difficulty that he would get in if he admitted blowing a one blast passing whistle?

A. I did not.

Q. Don’t you know that discussion took place amongst your crew? [336]

A. I don’t know anything about that.

Q. Don’t you know that Captain Keegan requested

(Testimony of J. F. Clemens.)

that nothing be said about that one blast passing whistle?

A. No, I never heard of such a thing.

Q. You never heard of it? A. No.

Q. Where were you at the time that you were called? A. I was in my berth, in my room.

Q. Awake?

A. Yes, I was awake; I was not asleep, because I heard the fog whistles.

Q. On Claimants' Exhibit "E," will you show us your room? A. Right there.

Q. Just mark that.

A. Right in there. It would be that door, right in there.

Q. Mark it with the letter "R," will you, please?

A. Yes.

Q. Where the man is sitting by the door?

A. That is a door in front of him.

Q. Just lay it on the desk and mark that with the letter "R."

Mr. DENMAN.—That is the room furthest forward?

A. The second room from the after end on the port side.

Q. Is that the one furthest forward in the deck-house? A. Yes.

Mr. CAMPBELL.—Q. This "R" does not show where it is; have I marked the "R" where you did?

A. Yes.

Mr. DENMAN.—Q. Is that "R" on the door of your room? A. No.

(Testimony of J. F. Clemens.)

Mr. CAMPBELL.—What door is that “R” on?

A. The “R.”

Q. The letter “R” I have written over a door; isn’t that the door to your room?

A. Yes, that is the door where I marked the “R.”

Q. That was the door to your room?

A. Yes, that door is closed, though.

Q. Is that the door to your room?

A. It is the second door from [337] the after-end; yes.

Q. What whistles had you heard the “Necanicum” blowing—what whistles had the “Necanicum” been blowing prior to the time that the mate called you?

A. She had been blowing, I heard the regular fog signal going, and I heard a passing signal of two short blasts of the whistle.

Q. Did you hear the “Beaver’s” whistle prior to that time? A. No, I did not hear it.

Q. How soon after the two blasts were blown were you called? A. Very soon after.

Q. Half a minute?

A. It was just a few seconds, a very, very short interval.

Q. How long would you say?

A. I could not say exactly; it was a few seconds, it was only a very short interval after I was called.

Q. So that we may have a more definite idea, how many seconds would you say?

A. I could not say; I did not have any watch to look to see exactly how many seconds it was; it was a very, very short while, just a few seconds; I was

(Testimony of J. F. Clemens.)

not taking the time with a stop-watch, or anything, so I could tell how many seconds it was, but it was just a few seconds.

Q. You have had experience at sea in taking your bearings, haven't you? A. I certainly have; yes.

Q. You know pretty well how long a minute is, don't you? A. Why, yes.

Q. Haven't you taken observations at sea?

A. Certainly.

Q. Doesn't that require you to have a knowledge of the length of time, say a minute's time?

A. You do not trust to guessing when you are taking time.

Q. I simply want a little more definite idea, if you can give it [338] to us, as to the length of time that elapsed between this passing whistle and the time you were called.

A. Maybe possibly eight or ten seconds; something like that.

Q. That would be your judgment on it?

A. Yes, something like that.

Q. What did the man say to you when he called you?

A. He did not say anything; he stamped his foot; that is the signal we had of calling each other out; there is no whistle to the room to be called by.

Q. What did you do when you came out?

A. I took a look forward, to see what I could see.

Q. What did you see?

A. I did not see anything.

Q. You did not see anything?

(Testimony of J. F. Clemens.)

A. No, there was nothing in sight from where I was standing.

Q. Where did you go to look, forward?

A. Right off my room, just a little forward of my room.

Q. Indicate with a cross upon this photograph where you went to look?

A. I stepped up to about here.

Q. The middle stanchions?

A. Yes, somewhere around about there, as near as I can say.

Q. Mark it with an "X."

A. Somewhere near there; I went around there, something like that, in here.

Q. Could you see over the fore-castle-head from that point? A. Yes.

Q. But you saw nothing then?

A. I saw nothing, no.

Q. Then what did you do?

A. I gave my attention to the log.

Q. Who told you to do that? A. Nobody.

Q. How was the log then streaming?

A. It was leading forward of the beam.

Q. What did you start to do, pull it in? A. Yes.

Q. Assume, Mr. Clemens, that what I have drawn on this paper is [339] a model of the "Necanicum"; assume that the line "A-B" is the forward end of your quarter-deck. Do you understand?

A. The forward end of the quarter-deck?

Q. Yes, the line "A-B"; what I have marked

(Testimony of J. F. Clemens.)

“house” is the house; let the crosses on the port side represent the two stanchions which are shown in the photograph, in Claimants’ Exhibit “E.” Where was your log streamed? A. Streamed right here.

Q. From the stanchions, the aft stanchions?

A. Yes.

Q. About what point would you indicate it?

A. The log was right in here.

Q. The point that I have marked “A” on Exhibit “E”? A. Yes.

Q. What kind of an outrigger did you have?

A. It is a common outrigger, with a pole, bolted to the rail.

Q. How long was the pole?

A. I think about six feet, or five feet, something like that—five feet long, something like that.

Q. Now, immediately you were called, did you go out of your room?

A. As quick as I could get out of it.

Q. At that time you found the line leading how, forward of amidships?

A. I did not look at it when I first came out; I went forward to see what I could see.

Q. How long did you remain forward?

A. How long did I remain looking forward?

Q. Yes.

A. I remained something over a minute.

Q. Over a minute in this place that you have marked with a “X” here?

A. Yes; I looked around here and could not see anything.

(Testimony of J. F. Clemens.)

Q. You remained alongside that stanchion for over a minute? A. Yes.

Q. What were you doing during that minute?

A. Watching to see if anything was going to hit us.

Q. Couldn't you see anything?

A. No, I couldn't see anything, nothing in sight; then I started to haul in the log line, and I [340] kept looking ahead over the bow, and I saw the "Beaver" bearing down on us.

Q. When you started to draw in the log line how was it leading? A. It was leading forward.

Q. Will you indicate upon this drawing which I have made the angle at which the line led?

A. The log line?

Q. These crosses represent the two stanchions, and I want you to show the point from which it led on the rail?

A. Your stanchion is here; the log was about here, and the log line itself was leading out about like that.

Q. Just mark it so that we will have it. The line "C-B" represents the angle of the log?

A. Yes, that is about it; something like that; a little more forward.

Q. How much of that log line did you haul in before the vessels came together?

A. I had three or four coils in my hand.

Q. Three or four coils?

A. I guess so; I did not count them.

Q. How long was the entire log line?

A. A little over 200 feet.

Q. How many feet did you have in?

(Testimony of J. F. Clemens.)

A. I don't know how many I had; I might have had in about 3 fathoms of the log line, something like that.

Q. 3 fathoms? A. About 18 feet.

Q. 18 or 20 feet?

A. Something like that, I suppose.

Q. What was it that caused you to stop hauling in more of that line?

A. I saw the other boat bearing down on us, and I let go of that.

Q. Where did you see that from?

A. From where I was standing, alongside the rail.

Q. Where could you over the forecastle?

A. I could see aft of the forecastle-head; I saw it aft of the forecastle-head. [341]

Q. Indicate on this drawing that I have made, which we have been using to show the angle of the log line, show me the part of the forecastle-head over which you saw the other vessel?

A. I did not see over it. I saw it aft of the fore-castle-head.

Q. Where were you standing at the time you were hauling in the log line?

A. I was working up that way—I was keeping my eye over to starboard; we had nothing on the port bow, it was clear. I was on the port side of the vessel, and I could see nothing there, and I naturally kept watching to see if anything was coming down on the starboard bow.

Q. To haul in the log line, did you take in the pole to which it was fastened, the outrigger?

(Testimony of J. F. Clemens.)

A. The outrigger.

Q. When you were taking in the log, did you walk again forward facing these stanchions?

A. Certainly, I stood right up here, and the outrigger leads in from here forward.

Q. From where did you haul in the line; where did you stand when hauling in the line?

A. About the amidship stanchion, about here.

Q. The stanchion that we have marked with an "X"? A. Yes.

Q. There you had a view over abaft the forecastle?

A. Yes.

Q. And you saw the other steamer then abaft the forecastle-head?

A. Yes, abaft the forecastle, bearing down on us, on the side of that bow.

Q. At that time, you dropped the lead line?

A. The log line.

Q. How long do you think it took you to haul in the three fathoms that you did, 18 or 20 feet?

A. From the time I was taking hold of the outrigger, maybe 30 seconds, something like that.

Q. How long did it take you to get out of your room after you were called?

A. Well, I don't think it took me very long, probably half a minute. [342]

Q. Half a minute? A. Yes.

Q. That was half a minute you were getting out of your room, and then you stood and watched over the forecastle-head for another minute and a half before you touchel the log line?

(Testimony of J. F. Clemens.)

A. No, I said about a minute.

Mr. DENMAN.—He said about a minute.

Mr. CAMPBELL.—Q. About a minute?

A. Yes.

Mr. CAMPBELL.—I offer this drawing in evidence; it shows the angle of lead of the log line.

Mr. DENMAN.—I object to it on the ground that the witness has not testified as to the accuracy of the drawing.

Mr. CAMPBELL.—The witness made it himself.

Mr. DENMAN.—The drawing?

Mr. CAMPBELL.—Yes.

Mr. DENMAN.—The drawing was made by you.

Mr. CAMPBELL.—I beg your pardon; I laid the models down and told him to assume that was the vessel, and asked him to draw the log line to show the lead of it, and that is what he did.

The COURT.—What is the exhibit?

Mr. CAMPBELL.—It is "Exhibit 5."

Q. Didn't the mate tell you to pull in the log line?

A. He did not.

Q. You swear to that, do you? A. Yes.

Q. You say that you grabbed the stanchion when you saw the other vessel come in sight? A. Yes.

Q. And dropped the log line at that time?

A. I did.

Redirect Examination.

Mr. DENMAN.—Q. What sort of a propeller have you on the "Necanicum," a right-handed propeller?

A. Yes. [343]

Q. With the engines reversed, how does it throw

(Testimony of J. F. Clemens.)

her? A. It throws her stern to port.

Q. I mean, how does it throw the water? Let me ask you: What is a right-handed propeller?

A. I don't know as I could explain that exactly.

Q. As you were looking forward, which way does the forward blade turn, to starboard or port?

A. When she is backing—

Q. (Intg.) The top throws to port? A. Yes.

Q. And throws the water in that direction?

A. Throws the water in the opposite direction.

Q. Well, it throws the water to port, does it not?

A. It throws the water to starboard.

Q. Just think a moment. Now we are looking away from you, we are standing astern of the vessel; we are on a row-boat astern, and she is beginning to reverse; in other words, the top of the propeller is turning to the left. Do you follow me? A. Yes.

Q. Now, as she turns to the left, I am asking you not about what the bottom of the propeller does on the water, but I am asking you what the top of the propeller, near the surface of the water, does with the water. Does it throw the surface water to the right or to the left?

A. Well, the surface water goes to the left.

Q. What would be the effect on your log line, as it passes the propeller in that water, as you commence to go astern?

A. I don't hardly know what effect it might have on the log line; it would depend altogether upon what position the log line came, whether it came close in to the wheel, or not.

(Testimony of J. F. Clemens.)

Q. How do you account for the log line being out in this position you have described?

A. The ship had sternway on her. [344]

Q. She had sternway on her? A. Yes.

Q. How long was that to the side of the vessel, that log line? A. I should judge about five feet.

Q. Five feet from the side of the vessel?

A. Five or six feet; yes.

Q. So that the distance "C-D" is about five feet?

A. Yes, I should think about that.

Q. On "Libelant's Exhibit No. 5"? A. Yes.

Q. How far was it from your vessel down to the water's edge, from where you were standing down to the water's edge?

A. I don't know, exactly, what the distance is from the quarter-deck.

Q. Would it be 15 feet?

A. Something about like that; it is somewhat similar like that.

Q. It might be as much as 20 feet, might it not?

A. No, I don't think it is 20.

Q. Now, when you saw the "Beaver" crossing your starboard bow, looking forward from the stanchions and past the house on your righthand side, from what direction did the "Beaver" come?

A. She seemed to be coming a little abaft the beam.

Q. Looking at it from the point where you were drawing in the line through the open space appearing in the photograph just under the left-hand of the bridge? A. Yes.

Q. From what direction did the "Beaver" appear;

(Testimony of J. F. Clemens.)

did she come from the house side?

A. Yes; from the starboard side.

Q. Your engines make considerable noise, don't they?

A. Oh, yes; they make about the usual amount.

Q. Would you want to swear that the mate did not call out to you to haul in the log line, or simply that you did not hear him?

A. I would not have heard him if he did. I did not hear him. I would not swear that he did not; he might have done it and I [345] would not hear.

Q. You say you would not hear?

A. I say I could not swear to what I could not hear; possibly he might have hollered, but I could not hear him; if he did holler to me, I didn't hear him or anything of that kind.

Q. This picture that you were just describing to me, the approach of the "Beaver" on, is this one marked Exhibit "E"? A. Yes.

Recross-examination.

Mr. CAMPBELL.—I do not understand your answer to Mr. Denman's question that the "Beaver" appeared to approach from the house side of the "Necanicum." Perhaps you can help me out. Do you mean that she appeared to be coming from abaft of the "Necanicum's" beam across your bow?

A. That is the way it looked to me, from where I was standing.

Q. Make a drawing so that I may see just how this outrigger is fixed on your vessel. Will you draw it for me, please?

(Testimony of J. F. Clemens.)

A. I don't know as I could draw it.

Q. Yes, you can.

A. I could give it to you only as good as I could remember it, to the best of my memory; that is all I could do.

Q. That is the best that anybody can do. I want you to show it to me, the form of the outrigger.

A. The form of the outrigger is about 2 by 4—

Q. Draw it with a pencil.

A. It is about a 2 by 4 foot piece of pine.

The COURT.—Is that what you mean when you say it was 5 or six feet long, the line that you have drawn between “C” and “D”?

Mr. DENMAN.—He said the line “C-D” leading forward was in the water about five feet from the vessel. That is correct, isn't it?

A. Yes, about five feet from the side of the [346] vessel, to keep away from the back-water.

Mr. CAMPBELL.—Q. Show me how the outrigger is fixed. What is this line here?

A. The outrigger came down like that; that is the end of it.

Q. How is it fastened?

A. With a guy there to the rail.

Q. Hinged on the rail?

A. Yes, with a bolt through the rail.

Q. And you hauled it in?

A. Yes, we hauled it in.

Q. How does the log line lead from the end of the outrigger? A. How does it lead?

Q. Yes, which direction?

(Testimony of J. F. Clemens.)

A. When she is running ahead?

Q. Yes. A. It would lead astern.

Q. Just show it to me. What you have marked as "A-B" is the outrigger, and "A-C" indicates the lead of the log line when your steamer is going ahead?

A. Yes.

Q. And the line "A-D" represents a guy that ran through the outer end of the outrigger to the rail?

A. Yes, to the rail.

Q. By which you haul in the outrigger?

A. Yes.

Q. It was hinged at the point "B"?

A. Bolted in.

Q. Now, Mr. Clemens, if, while you were running along ahead, the helm of your vessel was starboarded so as to turn your vessel to port, what effect would that have upon the lead of your log line?

A. It would lead at a greater angle away from the vessel.

Q. And the more your vessel turned—

A. (Intg.) It would take you some time to turn its position, it follows the ship, follows her track.

Q. And the more that your vessel turns, the broader the lead of the log line would be to the side of your vessel?

A. A certain amount it follows the track of the ship.

Q. But if your vessel was running along at full speed, and your [347] helm was put over to starboard so as to swing your head to port, does that increase the angle of the lead of the log line?

(Testimony of J. F. Clemens.)

A. Yes.

Q. So that instead of the log line being parallel to the side of the vessel, it would be at an angle to the side of your vessel?

A. It would be, for a little while.

Q. And the more that your vessel turns in her course the more that angle would be?

A. It only comes out so far, and it follows the track of the ship around.

Mr. DENMAN.—Q. How long did you say it was?

A. It was a little over 200 feet.

Mr. CAMPBELL.—I will offer that in evidence.

(The document was marked “Libelant’s Exhibit 6.”)

Q. What was the lead of your log line when you first came out on deck?

A. I did not look at the log line when I first came on deck.

Q. Didn’t you have any concern over it at that time?

A. I was looking ahead to see what was going to hit us.

Q. You never saw the log line for at least a minute after you came on deck?

A. Something like that, yes.

Redirect Examination.

Mr. DENMAN.—Q. Did I understand you to say it was leading forward at the time you drew it in?

A. Yes.

Q. About five feet from the side of the vessel?

A. Yes.

(Testimony of J. F. Clemens.)

Q. As it lay in the water? A. Yes.

Q. One question I want to ask you: How long have you been in the employ of the Hammond Lumber Company?

A. I have been in the employ of the Hammond Lumber Company for about a year.

Q. You are not going back to an employment, but you have been there steadily?

A. I have been there steadily all the time.

Q. You left your vessel to come up here, didn't you? A. Yes. [348]

Mr. DENMAN.—I did that because the suggestion was made he was going to a new employment on the vessel.

Testimony of K. Townsend, for Libellant.

K. TOWNSEND, called for the libellant, sworn.

Mr. CAMPBELL.—Q. What is your name?

A. K. Townsend.

Q. What is your business?

A. Marine engineer.

Q. On what vessel are you now an engineer?

A. The S. S. "Beaver."

Q. What position do you hold on her?

A. Chief engineer.

Q. How long have you been chief engineer?

A. 15 months.

Q. Were you on her prior to that time?

A. Yes.

Q. Were you on board of the "Beaver" at the time of her collision with the steam schooner "Necanicum"? A. Yes.

(Testimony of K. Townsend.)

Q. Were you in the engine-room at the time?

A. No.

Q. Where were you when the vessels came together?

A. I was just outside of my door on the hurricane deck.

Q. On which side? A. On the starboard side.

Q. Did you see the vessels before they came together? A. No.

Q. Do you know whether or not your vessel had been blowing any signals prior to the collision?

A. Yes.

Q. What signals were being blown, if you can tell us? A. I heard two short blasts just before.

Q. What were they? A. From our whistle.

Q. What kind of whistles were they?

A. Two short blasts, one right after the other.

Q. Passing whistles, or what?

A. Passing whistles.

Q. Did they come as one whistle of two blasts, or two separate whistles of two different blasts?

A. Two separate blasts.

Q. Do you know the passing signals?

A. I think I do.

Q. What did they indicate, that your vessel was going to turn to [349] port or starboard?

A. To port.

Q. Under the whistle which was given, which way would the bow of the vessel swing?

A. She would swing to starboard.

Q. Did you operate the engine at all prior to that collision? A. No.

(Testimony of K. Townsend.)

Q. I hand you what purports to be the engineer's log, and ask you in whose handwriting it is?

A. That is in my own.

Q. From what did you make up the entries?

A. The entries?

Q. Yes.

A. From the bell-book that was in the engine-room.

Q. From the bell-book? A. Yes.

Q. Did you record the entries in the bell-book in the engine-room?

A. No, the second assistant did that.

Q. What did you do upon the collision occurring?

A. I went right down below to the engine-room.

Q. Will you show me which of the two books I hold in my hand you used in making up your entries in the official log? A. This is it, the one here.

Q. The smaller of the two?

A. That is the one that was in the engine-room all the time.

Q. The one that has on it "Bell-book, S. S. 'Beaver' "? A. Yes.

Mr. DENMAN.—Q. What is the other book?

A. The other one is the one it is copied in afterwards.

Mr. CAMPBELL.—I have nothing further to ask him, excepting I would like to state something regarding these photographs; if what I say is not proper, I ask the court to disregard it in the consideration of the case.

(Testimony of K. Townsend.)

Mr. DENMAN.—Is it something the witness is going to testify on?

Mr. CAMPBELL.—No. It is something that will not be instructive in any way at all. I hold in my hand a photograph which the [350] chief engineer has handed to me this noon which he says is a photograph of the “Necanicum” taken from the deck of the “Beaver” by a passenger and sent to him by this passenger subject to the stipulation that the passenger told him that he took the photograph and would send it to him. Now, he does not know the name of the passenger; he did not see the picture taken, and I simply bring it to counsel’s attention, in order that he may use it in any way he sees fit. If he is willing it should go into the evidence as a photograph that was taken at that time, I am; if he is not, why, of course, it does not go in. But it is a photograph that was handed to me by the chief engineer under those circumstances, and I leave it for you to say.

Mr. DENMAN.—I would like to ask a question.

Mr. CAMPBELL.—I simply called the chief engineer to ask if he had any log-book, so that any questions might be asked him that were desired. The engineer who was on watch, who handled the engine, I find is on board the steamer “Pennsylvania” bound for Panama, and his deposition will have to be taken when he returns. The mistake in not having him present is my own mistake, and arose under these conditions, that when I asked for the detention of the witnesses, I took the names of Mat-

(Testimony of K. Townsend.)

thewson and Townsend from an entry in the log which is dated October 30th. I subsequently discovered that Mr. Matthewson was not the engineer who was on watch, but that Mr. Salter, whose name appears up in the body of this page, was on watch, but at that time he had gone on the "Pennsylvania" to Panama, so that I will have to ask the privilege of offering him as a witness subsequently. The reason that he failed to be present arose precisely under these circumstances.

Mr. DENMAN.—I would like to ask some questions about this [351] picture. I don't know whether I want to use it or not.

Q. When did you receive it, how long ago?

A. About two days after the accident, I should judge.

Q. Where did these come from?

A. I think I took one of those myself; the other two, I don't know who took them.

Q. When did you first show this picture to anybody in the company; how long ago, how many months ago?

A. I don't know whether I could say that.

Q. Some months ago, was it not?

A. I don't know as I did.

Q. Just think a moment: When did you first call the company's attention to the fact that you had this picture. Do you remember when you went up to Mr. Campbell's office just after the accident and made your statement? A. Yes.

Q. You remember that, don't you? A. Yes.

(Testimony of K. Townsend.)

Q. You remember having the picture then, do you?

A. Up in the office?

Q. You remember you had the picture?

A. I had the picture right along.

Q. Why did you give it to him, or did you give it to him then? A. No.

Q. I don't suppose you did. Why didn't you?

A. Because the picture belonged to me.

Q. You knew it had this picture of the "Necanicum" on it, didn't you? A. Yes.

Q. You didn't say anything about it at that time?

A. No.

Mr. DENMAN.—I don't see that it can serve any purpose.

Mr. CAMPBELL.—My first knowledge of that picture came yesterday, when the master and chief officer—I think the first officer first told me, and I sent to-day a wireless to this man to ask him to bring it when he came here. [352]

Mr. DENMAN.—There is no question about that. I misunderstood Mr. Campbell in saying he had simply been handed it this noon.

Mr. CAMPBELL.—Since the court opened at two o'clock.

Mr. DENMAN.—What is the significance of it?

Mr. CAMPBELL.—It simply shows the "Necanicum" as she was after the collision. I think a photograph of that kind, taken immediately after an accident, is a valuable addition to the conditions that gave rise to the collision. I appreciate I cannot ask to put it in. It is something that came to my atten-

(Testimony of K. Townsend.)

tion that might bear on the case.

Mr. DENMAN.—Just leave it here. It may appear later on as having some significance. Mark it for identification.

Mr. CAMPBELL.—No, I will keep it. If you want it I will produce it. If it is marked for identification, then it becomes part of the record.

Mr. DENMAN.—No, not if it is marked for identification; I do not want to put it into the record.

Mr. CAMPBELL.—I will keep it.

Mr. DENMAN.—What do you desire to prove, Mr. Campbell, by this other witness that you intend to take the deposition of afterwards; maybe we could prove it right here, or admit it.

Mr. CAMPBELL.—I know nothing further than what is disclosed by his log; simply that Mr. Salter will testify to having received and having carried out the bells which are recorded in the log under date of October 30th.

Cross-examination.

Mr. DENMAN.—Q. Do you know where these bells are of October 30th in this book, Mr. Townsend? A. Yes; right here.

Q. Is this the ordinary bell-book?

A. Yes; that is what we carry on the desk. [353]

Q. You, yourself, don't know anything about these entries, do you? A. No.

Q. I notice that all of the entries in this book are entries that are made on the even minute?

A. Yes.

Q. What does that mean? All these entries do

(Testimony of K. Townsend.)

not happen on the even minute. What does it mean?

A. The bells in the book were put down as soon as we got the bell.

Q. But suppose you got a bell at 2:15½, how do you enter that?

A. We put it down inside of a minute.

Q. What would you mark 2:16 and 5 seconds?

A. 2:16.

Q. What would you mark 2:16, 25 second?

A. 2:16.

Q. What would you mark 2:17, 35 seconds?

A. 2:17.

Q. And 35 seconds? A. 2:17.

Q. In other words, if it is past, everything ahead of the minute is marked back to the minute up to the next minute? A. Yes.

Mr. CAMPBELL.—What is that?

Mr. DENMAN.—If it appears ahead of the minute, it is marked back to the minute.

Mr. CAMPBELL.—Q. Suppose it is 2:16 and 35 seconds? A. We mark that 2:16.

Q. (The COURT.) Everything between 2:16 and 2:17 is marked 2:16? A. Yes.

Mr. DENMAN.—Q. Would that be true if it was 5 seconds before the minute? A. Yes.

Q. Is that the universal practice on the “Beaver”?

A. That is the way we do, yes.

Q. You are the chief? A. Yes.

Q. This man who made this entry was under you, was he? A. Yes.

Mr. DENMAN.—We will admit that the other

(Testimony of K. Townsend.)

witness, if produced here, would testify that he entered the bells as appears [354] by the bell-book, Mr. Campbell.

Mr. CAMPBELL.—Will you admit that the log-book may go in evidence?

Mr. DENMAN.—I will admit that he would testify that these entries, the following entries were made—

Mr. CAMPBELL.—I think if you will admit the entries made in that log are correct entries, that is sufficient; you can let the reporter take the log and copy it, or the log itself could go in as a part of the evidence.

Mr. DENMAN.—I will admit the following entries were made by the engineer in charge, October 30, 1913: “2:16, astern full. 2:18, ahead full. 2:19, ahead slow. 2:20, ahead full. 2:25, slowed to 70 revolutions.”

Mr. CAMPBELL.—My understanding of this is that the engineer who was working the engines on the 30th of October would testify as Mr. Denman has admitted. That is satisfactory to me.

Mr. DENMAN.—Q. Mr. Townsend, you say that you heard these two blasts one right after the other?

A. Single blasts.

Q. Pretty close together; that is correct, isn't it?

A. Well—

Q. (Intg.) Was there an interval of as much as five seconds between the two?

A. Oh, yes, I should say more than that.

Q. As much as ten?

(Testimony of K. Townsend.)

A. Well, I could not say that.

Q. You mean to say between five and ten somewhere? A. Well, they were not close together.

Q. You mean by that they were not "toot-toot"?

A. Yes.

Q. But they were between five and ten seconds apart; that is your estimate, is it?

A. I could not say for sure.

Q. Would you say 15 seconds apart?

A. No, I could not say for sure.

Q. I am not asking you for sure; I am asking what your estimate [355] was; you say very close together, but not close enough—

A. (Intg.) To be one whistle, you might say.

Q. They were just far enough apart to distinguish them as two whistles?

A. Two distinct whistles, yes.

Q. That would not be more than fifteen seconds apart, anyway; that is quite an appreciable amount, isn't it? A. Yes, 15 seconds is.

Q. It would not be more than that, at any rate?

A. I could not say for sure.

Q. Could you say at all?

A. No, I could not say.

Q. What did you mean by saying they were right close together, two short blasts close together?

A. It seemed to me that they were close together.

Q. Your impression was then that it would not be more than 15 seconds, but you do not want to swear to it accurately: is that it? A. That is it.

Q. Immediately after the second whistle you be-

(Testimony of K. Townsend.)

gan to go astern, and you went below: Is that it?

A. Yes.

Q. And you had gotten below at the time of the collision?

A. No, I was outside my door at the time.

Q. Just started below?

A. Just going down below.

Q. It is your duty, when you are reversing full speed, to get down below as soon as possible, isn't it?

A. Yes.

Q. So you didn't even have time after you began to reverse, to get down to the engine-room before the collision? A. No.

Q. You are sure of that?

A. Well, you see, I was on the main deck at the time, and I went up on the hurricane deck.

Q. What did you go up on the hurricane deck for if it is your duty to go down to the engine-room as soon as you reverse full speed astern?

A. I went up on account of the whistle. [356]

Q. But immediately she went full speed astern you started to go to your engine-room: Is that it?

A. No.

Q. I thought you just stated you did. What is the reason for your contradiction?

A. As soon as I felt her strike I went down below.

Q. I thought you just stated to me it was your duty to go below as soon as you heard the engines begin to reverse? A. Yes.

Q. In this case, she struck before you had a chance to get below?

(Testimony of K. Townsend.)

A. No, no. You know, there are times when you won't feel her reversing; you might be in a position where you could not feel her reversing right away.

Q. Where is your room, with reference to the engine-room? A. My room is right over it.

Q. What bells did you hear?

A. I could not hear them from my room.

Q. You could not hear the bell from your room?

A. Not where I was.

Q. Where were you in your room that you couldn't hear the bell?

A. I was on the main deck at the time.

Q. On the main deck? A. On the main deck.

Q. How do you know she was reversing, then?

A. Because when I went in the engine-room she was reversing.

Q. You did not feel her reversing until you went into the engine-room?

A. Not when I was on the main deck; no.

Q. When did you first feel her reversing?

A. When I got outside my door.

Q. And then you started for the engine-room: Is that it? A. Yes.

Q. That could not have been more than 10 or 15 seconds, could it? A. 10 or 15 from what?

Q. From the time she began to reverse.

A. The collision?

Q. No, I say from the time that she began to reverse to the time you felt her reversing, it could not have been more than 10 [357] or 15 seconds.

A. Yes, as I had come up on the main deck.

(Testimony of K. Townsend.)

Q. How long did it take you to come up on the main deck? A. I could not say.

Q. You walked as fast as you could when you heard the whistle? A. Yes.

Q. What made you walk as fast as you could when you heard these two whistles; was it because they were close together?

A. Then I heard the three whistles.

Q. From where? A. From our ship.

Q. Just after the two whistles came the three whistles? A. Yes.

Q. Almost immediately?

A. Well, I could not say that.

Q. Within ten or fifteen seconds?

A. Yes, I think so.

Q. Then after that, as soon as you heard the three whistles, you went below to your room?

A. I went up on the hurricane deck and started to go through to my engine-room below.

Q. Then as soon as you heard the three whistles, as fast as you could you started for the engine-room, did you? A. No.

Q. What did the three whistles indicate?

A. My engines are going full speed astern.

Q. You said it was your duty to go to the engine-room as soon as you heard the full speed astern whistle? A. Yes.

Q. As soon as you heard the whistles, you knew you were going astern, did you? A. Yes.

Q. You didn't feel the vibration until just after that? A. After what?

(Testimony of K. Townsend.)

Q. After you heard the three whistles? A. No.

Q. Are those powerful engines? A. Yes.

Q. How long does it take to put the vessel over?

A. Put her astern?

Q. Yes.

A. Well, you can put her right over. [358]

Q. You didn't feel, until some seconds after the three whistles were blown, in fact, you did not feel it until you were on the deck above and she was reversing; that is correct, isn't it? That is what you stated, is it not? A. State that again.

Q. What you said was that you heard three whistles when you were on the lower deck? A. Yes.

Q. That you came up above on the hurricane deck? A. Yes.

Q. On account of hearing the three whistles?

A. Yes.

Q. And when you got on the hurricane deck you went as fast as you could down to the engine-room, because it was your duty to be there? A. Yes.

Q. As a matter of fact, as soon as you heard the three whistles, you tried to get to your engine-room as fast as you could, didn't you? A. Yes.

Q. The main deck is covered over, I suppose.

A. Yes.

Q. You could not see anything from there, could you? A. No.

Q. So when you heard the three whistles, you started immediately upstairs? A. Yes.

Q. On the next deck? A. On the next deck.

Q. Hurricane deck? A. Yes.

(Testimony of K. Townsend.)

Q. To go through your room down into the engine-room? A. Yes.

Q. And you did that as fast as you could?

A. Yes.

Q. But in spite of that the vessel struck before you got to the engine-room? A. Yes.

Q. Whereabouts were you when she struck—on the way to the engine-room?

A. Just outside my door.

Q. So that all the distance you had gotten between the three whistles and the time of the vessel striking was just outside your door? A. Yes. [359]

Q. That is correct, is it? A. Yes, sir.

Q. And you had gone as fast as you could?

A. Well, I was not running, no.

Q. I mean as fast as you could without getting into a run; that is correct, is it not? A. Yes, sir.

Redirect Examination.

Mr. CAMPBELL.—Q. Whereabouts were you on the main deck?

A. I was in the third assistant's room at the time.

Q. And where is that?

A. That is a little aft of amidships, we will say, just forward of the saloon.

Q. On which side? A. The starboard side.

Q. On which side was the stairway leading to the hurricane deck? A. The starboard side.

Q. How far was the engine-room from the hurricane deck—I mean how far was the third engineer's room?

(Testimony of K. Townsend.)

O. Oh, I should judge 50 or 60 feet anyway.

Q. How many seconds would you say elapsed between the time you heard the three whistles blown on your vessel and the collision?

A. I should judge it would be over a minute.

Recross-examination.

Mr. DENMAN.—Q. Did it take you a minute to go from the third engineer's room 60 feet and up the head of the stairs and by the door to go down in the engine-room? A. Yes, sir.

Q. You swear to that?

A. No, because I did not time it.

Q. Aren't you thinking of the bells that you saw when you went down in the engine-room in fixing the time at a minute? A. What is that?

Q. Aren't you thinking about the bells that you saw on the log here when you say it was a minute?

A. No.

Q. You did not loiter on the way up there when you heard three whistles astern, did you?

A. No, not on deck. [360]

Q. How is that? A. I say not on deck; no.

Q. Have you a photograph of the "Beaver"?

A. I could not say for sure.

Q. Where is the stairway? Is it forward?

A. The stairway is forward, yes, sir.

Q. It is forward of the third assistant's room?

A. Yes, sir.

Q. And you went up to the head of the stairway?

A. Yes, sir.

Q. And that is right alongside the door, is it not?

(Testimony of K. Townsend.)

A. Oh, no, you have to go aft again.

Q. How far do you have to go aft?

A. Oh, I should say 60 or 70 feet.

Q. How many stairs are there; how high is one deck above the other?

A. Say about 8 feet, 7 or 8 feet.

Further Redirect Examination.

Mr. CAMPBELL.—Q. Is there any custom on board your ship as to checking the bridge clock and the engine-room clock? A. Yes, sir.

Q. When are they checked?

A. We generally check them leaving port.

Q. What is the reason for your recording the minute at the end of the minute?

A. At the end of the minute?

The COURT.—At the beginning of the minute?

The WITNESS.—At the beginning of the minute.

Mr. CAMPBELL.—As I understood his statement it was that if it was 2:16:35, he would record it as 2:16 instead of 2:17.

Q. Is that right? A. Yes, sir.

Q. When I say “at the end of the minute” I mean at the end of the next minute.

The COURT.—The end of one minute is the beginning of the other practically. [361]

Mr. CAMPBELL.—Q. If the time was, we will say, 2:59 you would record that as 2 minutes and 59 seconds; say it was 2 minutes and 59 seconds after 9 o'clock, you would record that as 9:02, would you not? A. Yes, sir.

(Testimony of K. Townsend.)

Q. What is the reason for doing that?

A. We don't use any half or quarter minutes.

Q. Does it have anything to do with the counter on your engine? When does the counter on your engine record the revolutions?

A. We take them right on the minute.

Q. When does it record? Does it record on the minute or on the half minute?

Mr. DENMAN.—I don't want the gentleman behind you, Mr. Campbell, to nod his head to the witness.

Mr. CAMPBELL.—It was unintentional.

Mr. DENMAN.—I know, but the witness caught it, whether it was unintentional, or not.

Mr. CAMPBELL.—We will withdraw the entire question; that is all.

Testimony of C. F. Parker, for Libelant.

C. F. PARKER, called for the libelant, sworn,

Mr. CAMPBELL.—Q. What is your name?

A. C. F. Parker.

Q. What is your business?

A. Master mariner.

Q. How old are you? A. 34.

Q. How long have you been a master mariner?

A. I have been master mariner about 21½ years.

Q. How long have you been going to sea?

A. 21 years.

Q. On what vessel are you now employed?

A. The "Beaver."

Q. In what position? A. Chief Officer.

(Testimony of C. F. Parker.)

Q. How long have you been Chief Officer of her?

A. 2½ years. [362]

Q. Were you on board the "Beaver" at the time of her collision with the "Necanicum"?

A. Yes, sir.

Q. Where were you when you first became aware of the presence of the "Necanicum"?

A. I was in my room.

Q. Where is your room located with respect to the bridge?

A. Just under the bridge, just at the foot of the bridge ladder.

Q. What was it that called your attention to the presence of the "Necanicum"?

A. A short blast of the whistle.

Q. Of whose whistle? A. Our whistle.

Q. Had your whistle been blowing prior to the time you became aware of the presence of the "Necanicum"? A. Yes, sir.

Q. What whistle? A. The regular fog-signal.

Q. What is the regular fog-signal?

A. A 5-second blast of the automatic whistle.

Q. How often?

A. It blows every 55 seconds—55 seconds interval.

Q. What character of a whistle have you on the "Beaver"?

A. A regular steam-whistle; about a 10-inch whistle, I would say. I never measured it.

Q. What is the tone of it? A. A deep base.

Q. What kind of a whistle was given which called your attention to the "Necanicum"?

(Testimony of C. F. Parker.)

A. A short, sharp blast.

Q. What would you call the whistle?

A. I would take it to be a passing signal after the regular fog-signal had been blown. That is what called my attention to it.

Q. Which way would it call for the bow of your vessel to turn? A. To starboard.

Q. What, if anything, did you do after you heard this passing whistle?

A. I waited for about $\frac{1}{2}$ a minute or so and then I heard another one and then I heard an answering whistle. [363]

Q. What was the answering whistle?

A. A short blast, one blast.

Q. What, if anything, did you do then?

A. I heard the telegraph ring then, and I went up on the bridge to see what we were coming into.

Q. How far is your room from the bridge?

A. Just at the foot of the bridge ladder.

Q. What did you see when you went on to the bridge?

A. I saw the steam schooner, the "Necanicum" approaching on the port bow.

Q. What did you do then?

A. I saw she was going to hit. At first I intended to ring the emergency bell but the captain was standing in front of the scuttle so I decided I would go into the wheel-house and ring it myself, and I was going to go into the wheel-house to do it but I saw it would be too late to do it so I jumped down on the fore-castle-head to get the passengers out of the way.

(Testimony of C. F. Parker.)

Q. Did you see the two vessels come together?

A. Yes, sir.

Q. In what position did they strike?

A. At nearly a right angle.

Q. Was any lookout being maintained on the "Necanicum"?

A. Not to my knowledge; I could not see anyone on the forecastle-head.

Q. Did you observe the "Necanicum" to see whether or not there was a lookout?

A. Yes, sir. There was no one there when they came together.

Q. How soon before they came together did you observe the forecastle-head of the "Necanicum" so as to determine whether or not there was a lookout?

A. Half a minute or so.

Q. Did you see anyone on the "Necanicum's" bridge? A. No, sir.

Q. Did you after the collision?

A. Just after, when we passed. [364]

Q. What did you see?

A. I saw a man on the wing of the bridge, in his shirt sleeves.

Q. Did you see two men there? A. Only one.

Q. Do you know whether or not the "Beaver" was keeping a lookout? A. She was; yes, sir.

Q. When you went forward, did you see him?

A. Yes, sir.

Q. Where was he standing then?

A. Right by the scuttle.

Q. Did you observe the speed with which the

(Testimony of C. F. Parker.)

“Beaver” was going at the time of the collision?

A. Yes, sir, she had a little headway.

Q. What, in your judgment, was the speed?

A. Well, I would not say over 2 knots, 2 or 3 knots.

Q. From the time you saw the “Necanicum” when you first went on the bridge up to the time of the collision, would you say there was any change in the “Necanicum’s” position?

A. From the time I saw her first?

Q. Yes.

A. She was swinging toward us all the time.

Q. Under what sort of a helm would she have to be to swing as you saw her?

A. A starboard helm.

Q. What did you do after the collision?

A. I went down on the forecastle the first thing to see if there was anyone hurt. I sent the carpenter to sound the bilges. I came up and looked over her port bow to see if any damage had been done and sung out to the Captain that it was all above the water-line.

Q. Is there any custom aboard your vessel as to checking the clocks in the engine-room and on the bridge?

A. Yes, sir; the clocks are set by the time-ball every sailing day. All the clocks on the ship are compared.

Q. Is there any time-ball in San Francisco from which they are set?

A. On the Fairmont Hotel; yes, sir. [365]

Q. Is there any at Portland?

(Testimony of C. F. Parker.)

A. Yes, sir, on the Customs-house.

Q. What hour of the day does that drop?

A. It drops at noon.

Q. Is there any arrangement on the "Beaver's" whistle to take care of water that might get into it?

A. Yes, sir.

Q. What character of arrangement is there?

A. There is a trap that drains off all the condensed water from the pipe leading to the whistle; it keeps it clear at all times.

Q. Have you ever had occasion to blow that whistle yourself? A. Yes, sir.

Q. Will you state whether or not you have ever known it to fail to give forth a sound when steam was turned into it for that purpose?

A. Only once; once when the trap was out of order.

Q. What is the height of the whistle, the length of it?

A. I never measured it but I should say it was 3 feet, or over.

Q. What is the diameter? A. About 10 inches.

Q. How does the sound of the whistle compare with that of other whistles on other vessels plying on the coast?

A. It is a good deal better than the average whistle; in fact, I believe it is the best on the coast here.

Q. Were you aboard the "Beaver" at the time of her collision with the "Selje"? A. No, sir.

Mr. CAMPBELL.—Do you admit, Mr. Denman, that the record in that case shows that the officers

(Testimony of C. F. Parker.)

on the "Selje" heard the "Beaver's" whistle for 16 minutes before the vessels came together, during which period the "Beaver" was running full speed?

Mr. DENMAN.—Yes. [366]

Mr. CAMPBELL.—That is all.

Cross-examination.

Mr. DENMAN.—Q. Mr. Parker, all those things happened in pretty quick succession, did they not?

A. Yes, sir.

Q. You heard the three whistles; your duty is to get out, when you hear three whistles blowing?

A. Well, now, a man who took an interest in the ship would get out if he hears three whistles blowing.

Q. That meant that something was happening in the fog? A. Yes, sir.

Q. I notice the log says there was fog existing at Point Arena, and there was no change noted on the log up to the time that the captain came on deck, or on the bridge. Were the fog-whistles blowing all during that time?

A. No, sir, not all that time. I was not on deck when we passed Point Arena.

Q. You were not? A. No.

Q. How long had they been blowing?

A. Only a short time; I suppose 5 minutes or so.

Q. You disagree with the mate when he says they had been blowing about 20 minutes?

A. Disagree with whom?

Q. With Ettershank.

A. Well, prior to the time of meeting the "Necanicum" they had only blown about 5 minutes. There

(Testimony of C. F. Parker.)

had been some whistles blown, a blast or two, at different times.

Q. You don't blow until the fog gets down pretty thick?

A. We blow if we cannot see a mile. Sometimes we blow before that when we are coming into a fog bank.

Q. The usual practice though is to blow when you cannot see a mile? A. Yes, sir.

Q. Now, as I understand it, as soon as you heard the three whistles you came up on to the bridge?

A. Yes, sir.

Q. Where is your room located? [367]

A. Just at the foot of the bridge ladder, on the starboard side.

Q. It would take you about 5 seconds to get up there? A. Not over that.

Q. And when you got there you thought it was your duty to sound the alarm-bell?

A. When I saw the ships were coming together; yes, sir.

Q. You saw that as soon as you got there; that was the reason why they blew the three whistles, was it not?

A. I suppose it might have taken me a few seconds to see they were coming together.

Q. They blew the three whistles because they were coming together, didn't they?

A. Not necessarily. Three whistles mean that the engines are reversed. It does not mean necessarily that the ships are coming together.

(Testimony of C. F. Parker.)

Q. But it did in this case?

A. In this case it did; yes, sir.

Q. And as soon as you got up there you recognized this danger, you saw the same thing that the captain saw and concluded you had to give the alarm-bells; is that it? A. Yes, sir.

Q. And you went to give the alarm-bells but it was too late to give them?

A. I was going to. I saw the captain standing there. I was going to ask the quartermaster just below to do it but he would have to leave go of the wheel and so I was going to do it myself.

Q. But you didn't have time to do it and so you jumped down on to the forecastle-head; is that correct? A. Yes, sir.

Q. And got there just as she struck?

A. I got as far as the scuttle and I stood there and watched them strike.

Q. How far is it from the bridge to the scuttle?

A. I would say about 40 feet.

Q. How much? A. 40 feet. [368]

Q. And then she struck at that time; that is correct, is it?

A. I stopped there and saw them coming together, yes, sir.

Q. You would not have had time to get down to the forecastle—is that it?

A. There was no need to get down there, there is no use of getting down there.

Q. But you had started for the forecastle, had you? A. Yes, sir.

(Testimony of C. F. Parker.)

Q. You say that at the moment she struck you did not see any lookout on the "Necanicum"?

A. No, sir.

Q. After the vessels collided, what did your vessel do about standing by to assist the "Necanicum"? You know the rule, do you not, that controls?

A. Yes, sir.

Q. What did your vessel do?

A. We went ahead again after they drifted apart, after he backed off.

Q. You went ahead again; as a matter of fact, you went ahead again just as soon as you struck, did you not, in order to straighten her course out?

A. I do not know just what was done on the bridge. I went down to the fore-peak to see what damage was done to the ship. It was some minutes before I got back.

Q. Oh, I see. It was some minutes before you got back. A. Yes, sir.

Q. She had started on her return course then?

A. She was under way then, she was on her way when I came back on deck; yes, sir.

Q. You don't know what happened to the "Necanicum" in that interim, do you, between the time she hit and the time you came back from going down into the fore-castle?

A. The last view I had of him he was, I suppose, a length or so off us on our port beam; when I came up again he had disappeared in the fog. It was pretty thick then. [369]

(Testimony of C. F. Parker.)

Redirect Examination.

Mr. CAMPBELL.—Q. I will ask you whether or not the “Necanicum” was going ahead through the water at the time of the collision—what your judgment about that is.

A. Yes, sir, I am sure of it.

Q. If the “Necanicum” had been at a standstill at the position where you saw her when you went on the bridge could the collision ever have occurred?

A. No, sir. The only chance would have been of our stern striking her.

Q. If she had been at a standstill 10 feet from where the vessels were when they came together, would there have been a collision?

Mr. DENMAN.—Oh, we admit that, your Honor. That is an absurdity on its face. If she had been at a standstill there would not have been a collision.

A. Swinging on the port helm she would be hit with our port quarter 10 feet away.

Mr. CAMPBELL.—I will take the admission.

Recross-examination.

Mr. DENMAN.—Q. If she had been at a standstill 10 feet away from your vessel, and off on the port side of your vessel, she would not have struck at all, would she?

A. If she swung on the port helm the stern would have struck.

Q. If she swung on the port helm?

A. If we were swinging on the port helm and she was stationary our port quarter would have raked her.

(Testimony of C. F. Parker.)

Q. Your port quarter would have raked her?

A. Yes, sir.

Q. What do you mean by saying if she had been at a standstill at the moment of collision you would not have struck when you admit that your boat was going through the water at any rate at the speed of 2 knots?

A. Mr. Campbell asked me if the ship [370] was standing still would we have struck her.

Q. I say why do you say if she were standing still you would not have struck her when you admit that the vessel was going through the water at a speed of say 2 knots? A. I don't remember saying that.

Q. What speed did you have at the time of the collision? A. 2 or 3 knots.

Q. If our vessel was at a standstill and you were approaching her at the rate of 2 or 3 knots an hour why wouldn't you hit her?

A. We were not headed at the right angle to hit her. We would have gone across her bow.

Q. Your vessel flares up, does it not?

A. It flares out, an overhanging bow.

Q. That is to say, there is a V that widens like a Y at the top, as you look up? A. Yes, sir.

Q. So that the first part of your vessel to be struck would be the upper part, would it not?

A. Yes, sir.

Q. And then as the vessel cut in it would cut lower and lower down, would it not? A. Yes, sir.

Q. Now, I ask you whether the vessel shows scars further back aft at the lower part or the upper part?

(Testimony of C. F. Parker.)

A. Further aft you say?

Q. Yes, on your vessel?

A. It shows them further aft on the upper part on account of the flaring bow buckling in.

Q. Does the scar appear further in or further forward, the upper scar?

A. From the photograph it looks a little further aft; yes, sir.

Q. It does? A. Yes, sir.

Q. That is taken square on the side, is it not?

A. Yes, sir.

Q. Now, I will give you another photograph. That photograph [371] is "A" on "Exhibit No. 4." I ask you to take the forward part of the scar on that photograph and tell whether the scars are nearer forward or nearer aft at the bottom?

A. Well, speaking of the scars they look further aft but that stem was twisted over to port about 3 inches from the center line of the ship, from the impact of the striking.

Q. Let me ask you to look at the photograph "C" in this same exhibit and tell me how much the stem is set over, from that photograph?

A. The stem is set over to port.

Q. How much?

A. I could not say. I don't remember just the measurement. It was a foot or so, I guess.

Q. I want you to take this photograph marked "F" in this same exhibit and show me any plate on the stem that shows it has been bent at all at the bow to port? A. On the stem?

(Testimony of C. F. Parker.)

Q. Any plate on the stem that shows any bending in that direction, in that photograph?

A. No, certainly not.

Q. Is not the stem perfectly straight there?

A. No, sir, the upper end of the stem is over to port.

Q. The upper end of the stem is over to port or to starboard? A. To port.

Q. It is over to port?

A. To port; yes, sir. Also you will see that the starboard plates are shoved out here—the stiffener—which indicates that the other vessel hit directly on the other end of that stiffener. She would have to hit it there in order to crack the plates on the other side; otherwise the end of the plate would bend, it would not shove across.

Q. How do you account for the scraping down on the side of your vessel from forward aft?

A. The flare of the bow makes it appear that way.

Q. How about down here where there is no flare?
[372]

A. That is at the bottom where the stem doubled up; it showed two markings, one was the stem that remained, the other was the piece that broke off. It made two marks.

Q. She made two marks; first, where she hit; and second, where the injured part hit.

A. In the upper works it bent the stem over, split it; as that piece rolled around, from the force of the other vessel, it was like two stems against the ship's side, and it made two wrinkles.

(Testimony of C. F. Parker.)

Q. So your vessel was moving ahead you say at 2 knots? A. Yes, sir.

Q. When she struck first there was the mark of our vessel striking you, before she was hurt, and the second mark of her striking you after she was hurt—is that correct?

A. Yes, sir, they came very close together.

Q. They came very close together when they first touched, did they not?

The COURT.—He means the striking.

A. Our headway twisted that stem around on his port bow and broke it and then the force of the other vessel made two marks on that side.

Mr. DENMAN.—Q. It forced the stem around that was broken off?

A. Yes, sir, a piece of the stem.

Q. Did you examine the “Necanicum” after the collision? A. No, sir.

Q. You do not know then except from examining the scars here about the successive hitting of the two vessels?

A. The scars were evidence enough. You can see the print of both the anchors in our plates.

Q. Both the anchor-flukes?

A. I don't know whether it was the fluke or the crown of the anchor. It was the crown, I guess, and not the flukes. [373]

Q. Of both the anchors? A. Yes, sir.

Q. Are you sure of that? A. Yes, sir.

Q. How do you account for that?

A. That strengthens my belief that the ships came

(Testimony of C. F. Parker.)

together at right angles.

Q. I want you to show me on the photograph where you see the flukes of both anchors?

A. This photograph won't show it but it is right under this deadlight; there is a deadlight behind this anchor-stock; the other mark is just here, just below the anchor-stock.

Mr. CAMPBELL.—Q. Look through the other photographs, Mr. Parker, and see if you can find any that show it? A. That is part of it anyhow.

Mr. DENMAN.—Q. That is one blow, which appears under the word "Beaver" on your vessel, and under the bar of the anchor on the photograph "H" in "Exhibit 4." That is correct, is it not?

A. Yes, sir, just below the anchor-stock.

Q. That is where the anchor struck you, is it?

A. Yes, sir.

Q. Where was your anchor hanging at the time of the collision?

A. Our anchor was about I should say 3 feet forward of the position it is in now.

Q. How do you know that?

A. Well, I stow them every trip when we take them aboard.

Q. How can you tell it is 3 feet forward?

A. I say about 3 feet. The anchor comes just at the after part of this shoe-plate.

Q. And it was driven back those 3 feet?

A. Yes, sir.

Q. That is correct, is it? A. Yes, sir.

Q. Driven aft? A. Yes, sir.

(Testimony of C. F. Parker.)

Q. And this scar was just about at the foot of the anchor-bar? A. Yes, sir, from her anchor. [374]

Q. The scar was right at the foot of this anchor-bar?

A. Yes, sir, but the anchor had been shifted. Her stem shoved our anchor aft as she came into us. The shank of the anchor would follow around with her bow.

Q. Did you notice the injury sustained by the "Necanicum"? A. As he left us?

Q. Yes. A. Yes, sir.

Q. What injury did you notice on her?

A. His stem was split almost in two; a piece dropped off as he backed away.

Q. How high up was that?

A. Well, I don't know.

Q. How high above the water-line?

A. The bottom of the splinter was about 10 feet or so from the water-line.

Q. That is to say, from 10 feet above the water-line down she sustained no injury that you could see?

A. No, sir.

Q. You are sure of that, are you? A. Yes, sir.

Q. Of course, you observed her very carefully, did you not, to see that? You had the duty to stand by, did you not?

A. I took a look at her as she backed off. Striking ahead as she was there was not much danger—

Q. (Intg.) I am not asking you about your theory of it, I am asking you what you saw?

A. That is what I saw.

(Testimony of C. F. Parker.)

Q. And there was no injury at all to the lower half of the "Necanicum's" bow? A. No, sir.

Q. You are sure of that, are you? A. Yes, sir.

Testimony of Walter Bryning, for Libelant.

WALTER BRYNING, called for the libelant, sworn.

Mr. CAMPBELL.—Q. What is your age, Mr. Bryning? A. My age is 31.

Q. What business are you engaged in? [375]

A. My business is seaman.

Q. On what steamer are you working?

A. The steamer "Beaver"; the San Francisco & Portland Steamship Company.

Q. Were you on board the "Beaver" at the time of her collision with the "Necanicum"?

A. Yes, sir.

Q. In what capacity? What were you doing aboard the "Beaver" at that time?

A. I was on the lookout.

Q. How did you ship on her?

A. I shipped on her as a seaman.

Q. Whereabouts did you stand to maintain your lookout? Where did you stand during your watch?

A. On the forecastle-head.

Q. Where with respect to the stem of the vessel?

A. Right as far forward as I could get.

Q. Did you at any time see the "Necanicum" prior to the collision? A. Yes, sir.

Q. Where were you standing at the time you first saw her? A. In the eyes of the ship.

Q. I will hand you a photograph marked "J" of

(Testimony of Walter Bryning.)

“Exhibit 4” and ask you if you can show me on that photograph where you were standing when you first saw the “Necanicum”? A. Yes, sir.

Q. Whereabouts? Just take this pencil and mark it with a cross.

A. That davit she swung over, she swung over to that side.

Q. It is the place that you have marked with a cross? A. Yes, sir.

Q. What was the bearing of the “Necanicum” to your vessel at the time you first saw her?

A. Almost ahead, as far as I can recollect; if anything, a shade on the port bow.

Q. What do you mean by a shade on the port bow?

A. Well, a degree or two from where I was standing. I was [376] standing in that picture on the port side of that forestay and that stay is right amidships, and I was right on the port side of that stay.

Q. And how far off did you judge the “Necanicum” to be at that time? A. Well, fully a mile.

Q. What kind of weather had you been having prior to seeing the “Necanicum”?

A. Well, we had it kind of foggy, a fall and a rise in the fog all the time, a fall and a rise, a sort of a blanket fog, what I would call a blanket fog; it would rise and come down and rise and come down again.

Q. Had any whistles been blown on your vessel prior to your seeing the “Necanicum”?

A. Yes, sir.

Q. What kind of whistles?

A. There was a fog whistle going right continually.

(Testimony of Walter Bryning.)

Q. What kind of a whistle has the "Beaver"?

A. In what way?

Q. As to sound.

A. She has a very distinct sound.

Q. Is it a deep sound or a shallow sound?

A. It is a very deep sound, very, very deep. A sound you could hear for a long distance; it is one of the finest whistles I ever heard since I have been going to sea.

Q. From your observation how does it compare with other whistles up and down the coast?

A. The best. It is the most distinct whistle I have heard. There is only one whistle I can locate on points of land here that is something like it, Fort Point and Point Bonita, loud and low; you can hear them offshore a long distance. This whistle is something similar.

Q. Did you ever at any time see the "Necanicum" two or three points on the "Beaver's" starboard bow? A. No, sir.

Q. Did you ever at any time see her at all on the "Beaver's" starboard bow? A. No, sir. [377]

Q. What would be the further that you would say you saw her on the port bow, if she was on the "Beaver's" port bow at all?

A. Well, I would say a degree—

Q. I mean when you first saw her.

A. When I first saw her she would be at least about 2 degrees.

Q. What, if any, whistle was given by your vessel after you saw the "Necanicum"?

(Testimony of Walter Bryning.)

A. What is that?

Q. What, if any, whistle was blown by the "Beaver" after you saw the "Necanicum"?

A. I never heard no other whistle at all; I never heard the steamer "Necanicum's" whistle.

Q. Did you hear any whistle from the "Beaver"? I am asking you after you saw the "Necanicum"?

A. No, sir.

Q. Did the "Beaver" blow any whistle after the "Necanicum" came into sight?

A. She blew the fog signals and then she blew two more, and the steamers were about a mile apart and I seen she was getting too close, I came about 14 feet away, I didn't want to have no accident to myself and I backs out to about 14 feet, and I seen the way she was coming and I heard no whistle only from our own vessel, the steamer "Beaver."

Q. Did the "Beaver" blow any passing whistles to the "Necanicum"? A. Yes, sir.

Q. What whistles?

A. Two whistles; one and then one more.

Q. What whistles were they? Do you know the port and starboard passing whistles?

A. Well, no, I could not say that I do.

Q. Which way did the whistles blown by your vessel call for the "Beaver" to turn?

A. I could not say that. She blew one distinct whistle, and then in about half a minute—30 seconds—she blew one more.

Q. Did you hear any whistles from the "Necanicum"?

A. Afterwards I heard one whistle. [378]

(Testimony of Walter Bryning.)

Q. When was that, after the two whistles from the "Beaver"? A. Yes, sir.

Q. Did you ever hear three whistles from the "Necanicum"? A. No, sir.

Q. Did you ever hear any fog whistles from the "Necanicum"? A. No, sir.

Q. When you saw the "Necanicum" what did you do?

A. I reported a steamer right ahead, very little on the port bow, a steamer a little on the port bow.

Q. Reported to whom?

A. I reported to the bridge.

Q. Did you watch the "Necanicum" from that time on? A. Yes, sir.

Q. What change, if any, in course, did the "Necanicum" make from the time you first saw her to the time of the collision?

A. Well, I could not tell by talk, I could almost show you the way.

Q. Well, show it to us, if you cannot tell it to us.

A. There was one steamer coming right ahead to us, from the opposite way; we were heading down the coast, she was heading up the coast, she was bound north; this is the way we came, that way, almost at right angles.

Q. Almost at right angles? A. Yes, sir.

Mr. DENMAN.—Q. Which one was heading down the coast?

A. The steamer "Beaver"—my left hand.

Q. Your left hand? A. Yes.

Mr. CAMPBELL.—Q. Which way did the "Necanicum" turn? Did the "Necanicum" change her

(Testimony of Walter Bryning.)

course at all, change one way or the other?

A. Yes, sir.

Q. Which way did she turn?

A. The "Necanicum turned to my left hand.

[379]

Q. Into which side of the "Beaver"?

A. The port bow; the port side of the flag-staff; the port side of where I was standing.

Q. At about what angle did the two vessels strike?

A. Almost at right angles, like that (illustrating).

Q. Show us on the exhibit, photograph "M," where you were standing at the time the vessels came together? Mark it with a cross.

A. This ventilator here turns over; my head would come to that, right where that is there.

Q. Just mark it with a cross. Have you marked it?

A. Yes, sir. I came from here, and then from here I came to the ventilator and when I saw it coming too close I came here.

Mr. DENMAN.—What position is that?

Mr. CAMPBELL.—The position where he was standing when the vessels came together.

Q. Is that what you have marked here?

A. Yes, sir.

Q. Can you show me on the photograph about the line at which they came together? A. Yes, sir.

Q. Can you tell us whether or not that line drawn on the photograph represents about the way the two vessels came together? A. Yes, sir.

Mr. DENMAN.—I will mark that. The line is marked "C-D."

(Testimony of Walter Bryning.)

Mr. CAMPBELL.—That is all; you may take the witness. [380]

Cross-examination.

Mr. DENMAN.—Q. As I understand it, you saw this vessel, and you had heard two whistles from your own vessel, one succeeding the other; that is all the whistles you heard from your vessel? A. Sir?

Q. As I understand it, after you saw the “Necanicum” almost immediately your vessel blew one whistle?

A. We were blowing continuously, as I understand it, the fog.

Q. The fog-whistles? A. Yes, sir.

Q. And that had been going on for about an hour, had it not?

A. Well, it was blowing since I was on the lookout.

Q. When did you go on the lookout?

A. I went on the lookout at 1:30.

Q. So you had been blowing continuously from 1:30 on?

A. Well, no, sir; I was called up there—we have a rule in that ship to stand by at the time of fog; when there are two station-men there, there is one supposed to be handy at all times, and I was right underneath the scuttle, where I marked it there on the photograph, I was put there. When I went on the lookout, when the first whistle blows—nobody is asked to go up there, but as soon as the first whistle blows a man goes up there and that is all there is to it.

Q. And it was from that time it blew continuously?

(Testimony of Walter Bryning.)

A. From that time on there was fog here and fog there.

Q. It blew continuously?

A. Yes, sir. Sometimes she would light up and sometimes she would not.

Q. And sometimes it would be quite thick?

A. Sometimes it would be thick and sometimes it would not.

Q. (The COURT.) From all of this am I to understand that from 1:30 the fog-whistle blew continuously up to the time of the [381] collision?

A. Well, now, I can't recollect that—well, say about 1:30, yes; I had no watch on me at the time, and I could not figure the time, I had no instruments to tell the time with there, to tell it correctly. I have an idea of the time, around 1:30. At 1:30 I was on the lookout, and from that time up until we got struck, and then from then on until four. I came on watch at twelve o'clock noon until six in the evening.

Mr. DENMAN.—Q. Did your vessel at any time run at full speed in the thick fog?

A. Well, now, I could not tell you whether the vessel is running at full speed. I can tell you whether the vessel is running dead slow or full ahead. I could tell you that.

Q. Right away after the collision, did she run at full speed?

A. Well, no, sir—at the time of the collision, do you say?

(Testimony of Walter Bryning.)

Q. Right away after the collision did she run at full speed?

A. What do you mean by right away after the collision?

Q. Well, when the other vessel hit you, you picked up speed after that, did you not?

A. Well, say in ten or fifteen minutes, I should judge.

Q. You lay around there for fifteen minutes, did you? A. No, sir; we didn't lay around there.

Q. What did you do?

A. We were going ahead. When the vessel started to go ahead I don't know. But I know that the vessel was going astern— I knew that by the motion of the vessel, the vibration of the ship.

Q. After the collision, how long was it before you started up and went on?

A. I estimate it was about ten or fifteen minutes.

Q. Was it as much as ten minutes, do you think?

A. Well, there [382] were lots of passengers around there, and we were knocking around there, that is about all.

Q. It seemed ten or fifteen minutes to you before you left?

A. It seemed ten minutes, anyway, to me. Of course, the time is a long time ago now; it is 12 months, I think.

Q. It was not as short a time as a minute before you started? You stayed more than a minute before you left there, did you? A. Yes, sir.

Q. Five minutes, anyway, wasn't it?

(Testimony of Walter Bryning.)

A. We stayed all of ten minutes. I think we did, anyway. I will say all of ten minutes.

Q. You have not talked this case over with anybody before coming here, have you? A. Yes, sir.

Q. You have? A. I talked to Mr. Campbell.

Q. You didn't talk to him about how long you stayed after the collision, did you? A. No, sir.

Q. But you talked to him about things that occurred before the collision?

A. Just about things that I know about, that is all.

Q. You didn't have any discussion with him about things that occurred after the collision?

A. No, sir.

Q. He didn't talk to you about how long you stayed there, or anything like that? A. No.

Q. All you talked about was just the two minutes or so before the collision?

A. Just about the vessel.

Q. About the vessel being a mile off, and all that sort of thing? A. Yes, sir.

Q. You stayed on the lookout, you say, until four o'clock?

A. I was on the lookout until eight bells—four o'clock; yes, sir.

Q. And you were lying dead in the water there for ten or fifteen minutes, you say, after the collision?

A. I will say about ten [383] minutes. I have not no instruments or anything like that with me when I go on watch; when I go on watch I go to work, I don't go to keep time. You know what I mean.

(Testimony of Walter Bryning.)

Q. I know what you mean. I am not trying to catch you. I just want to get the facts, that is all. When you are lying still at sea in the fog, you blow two whistles, don't you? A. Lying still?

Q. When you are not moving, and when there is fog, you blow two whistles, do you not?

A. What do I blow two whistles for? What do I blow two whistles for?

Q. Two whistles when you have no way on at sea?

A. I don't know anything at all about the whistles. I know in foggy weather there is supposed to be a whistle or a bell.

Q. I am talking now about what occurred after the collision. Can you swear whether or not two whistles were blown, or one whistle was blown after the collision—fog-whistles—from your vessel?

A. Well, now, when we got under headway—

Q. (Intg.) No, before that, while you were lying still, or didn't you blow any whistles at all then?

A. Yes, sir; we blew a whistle.

Q. How many whistles did you blow—two whistles?

A. It seems to me it was the ordinary fog-whistle.

Q. The ordinary fog-whistle? A. Yes, sir.

Q. Although you were lying there still in the water for ten minutes; that is right, is it?

A. I can't tell whether we were there three minutes or ten minutes; I am not sure of that.

Q. I thought you said, you were pretty sure it was ten minutes?

(Testimony of Walter Bryning.)

A. Well, I say no longer than ten minutes; I don't think so.

Q. You have cut it down now?

A. No longer than ten minutes.

Q. Why did you say before, ten or fifteen minutes?
[384]

A. Did I say ten or fifteen minutes?

Q. Yes.

A. Well, I didn't have no watch on me to tell the correct time. In a place like that where I was, and when you see about 200 passengers around, what are you going to do, yourself?

Q. You were about ten minutes keeping the passengers from going through the rope there, weren't you? A. No, sir.

Q. What were you doing?

A. I was hunting around there to see what damage was done.

Q. That was all before you started on again?

A. Yes, sir. Now, can I recollect the time it took me to do that? It might take me two seconds or it might take me an hour.

Q. Well, it was not an hour, was it?

A. Oh, no, it was not an hour.

Q. You say you were looking to see what damage was done. Where did you go to see that?

A. Where did I go to see it?

Q. Yes?

A. By the bell that was struck and the men that came on deck.

Q. I say, where did you go to see what damage

(Testimony of Walter Bryning.)

there was? You were right there, were you not?

A. Yes, sir; I was right there. After the other steamer bounced off us, I put my hand on the rail and looked over; there was about four feet of teak-wood rail that I had hold of went overboard. I was standing on the anchor. That is all there was to it. When I seen everything was loose around the rail, I backed away from it and I went in the middle of the deck. That is all there was to it. I stood there and the vessel went ahead. I don't know how long it took me to do that; it didn't take me very long, anyway.

Q. The passengers were about there, were they, and you had a line there?

A. I had the line there, but what are you going to do [385] when there are 200 passengers—they looked all of 200 passengers to me around the place there, abaft of the line, where I had the line strung up to save the passengers going forward and interfering with the lookout. They would all break through to have a look at the damage. Where one sheep goes a hundred will go; one will follow the other. That is the way it is with those passengers.

Mr. DENMAN.—I would like to see that photograph, Mr. Campbell.

Mr. CAMPBELL.—If the photograph is to be used, it should go into evidence so it will be a permanent part of the record.

Mr. DENMAN.—I shall use it simply as a matter of comparison of what he saw and not as an actual photograph.

(Testimony of Walter Bryning.)

Mr. CAMPBELL.—I think as long as I have produced it voluntarily, as I have, you ought to introduce it in the record as an exhibit.

Mr. DENMAN.—If I use it at all, I shall put it in as an exhibit, but I will not put it in with any admission as to what the other side claims it shows, if your Honor please.

Q. You say that at the time the vessels came together you could see a vessel about a mile off, could you?

A. At the time the vessels came together?

Q. I mean at the time of the collision, you could see about a mile, could you? A. Yes, sir.

Q. That is to say, if there had been a vessel about a mile off from the bow, just after the collision, you could have seen her?

A. I could have seen her.

Q. You are sure of that, are you?

A. Absolutely.

Q. I ask you whether it was as foggy as that, just after the collision (handing photograph to witness)?

A. Yes, sir. [386]

Q. It was as foggy as that? A. Yes, sir.

Mr. DENMAN.—I offer this in evidence for the purpose of showing how foggy it was just after the collision, and the witness' estimate of a mile.

(The photograph was here marked Claimant's Exhibit "G.")

Mr. CAMPBELL.—You offer that in evidence as proof of the condition that existed immediately after the collision?

(Testimony of Walter Bryning.)

Mr. DENMAN.—Not in the least. I offer it to show what this man's testimony is as to his estimate as to the condition of the atmosphere.

Q. Do you remember, about five or six minutes after the collision—no, I will ask you this way; just about after you got under headway again, it set down quite thick?

A. It did set down thick, yes, sir.

Q. About five or ten minutes after the collision?

A. About ten minutes after the collision; yes, sir—about five minutes.

Q. About five minutes?

A. Five or ten minutes.

Q. That is to say, it set down to thick fog about 2:25. Have you seen the log-book of the ship?

A. No, sir, I ain't seen the log-book since I have been in the ship.

Q. Now, as I understand it, you have described to Mr. Campbell all of the whistles you heard after the vessel came in sight? A. Yes, sir.

Q. I understand you to say that the vessels were reversing, or that your vessel was reversing, at any rate? A. Yes, sir.

Q. And that you could feel her reversing?

A. Yes, sir.

Q. And this came almost immediately after you heard the second single blast from your whistle?

Mr. CAMPBELL.—What almost came?

Mr. DENMAN.—This jarring, the reversing of your vessel. [387] A. Yes, sir.

(Testimony of Walter Bryning.)

Direct Examination.

Mr. CAMPBELL.—Q. I will ask you whether or not this photograph which has been offered in evidence as Claimant's Exhibit "G" shows a picture of a vessel at all similar to what you saw of the "Necanicum" after the collision?

A. Yes, sir, but, if any, her stern was more over that way; well, I should judge that way. Jumping down and doing things on the deck, and naturally looking at the other vessel, you would naturally look back.

Q. Your recollection is that the picture of the "Necanicum," after the vessels had separated,—how does your recollection correspond with what is shown by that photograph?

A. Yes, I think it would.

Q. You think what would?

A. I would think that would be just about it; I would say that, any way; as near as I could tell, that would be about the way she came, the way she backed off.

Mr. CAMPBELL.—I have the log-book which the record shows Mr. Denman asked to be introduced, and the memorandum which has been handed me by the general manager of the company, which he also asked to be produced. I would like to recall the chief officer, Mr. Parker, and let Mr. Denman question him to-night, if he wants to, with respect to these entries, because I want to get him away to-morrow noon on a ship, if possible, unless your Honor is too tired to take it up.

The COURT.—Oh, no, I will hear him. [388]

Testimony of C. F. Parker, for Libelant (Recalled).

C. F. PARKER, recalled.

Mr. CAMPBELL.—Q. Mr. Parker, Mr. Denman may want to question you regarding the experiment that was made on board the “Beaver” somewhere north of Point Reyes, between there and Point Arena, as to her stopping ability, and so forth. Were you present at the time that experiment was made?

A. Yes, sir, I was present and took the distances she traveled.

Q. Will you describe to the Court what was done?

A. We got the ship at a speed of $14\frac{1}{2}$ knots—about $14\frac{1}{2}$ knots, and ported the helm and backed the engines full speed.

Q. What I am wanting to know is, what did you do? How did you measure the distance that you ran before your vessel came to a stop?

A. Measured the distance with a sextant, from a floating barrel with a flag on it.

Q. Were any entries made in the log at that time?

A. Yes, sir.

Q. Do you know who made them?

A. I made them myself.

Q. I hand you what purports to be a log-book, and ask you whether or not that is a record of the experiment? A. Yes, sir.

Q. In whose handwriting is it?

A. It is my own.

Q. Will you tell the Court what the experiment produced?

(Testimony of C. F. Parker.)

A. Do you want me to read this from the book?

Q. Can you testify without refreshing your recollection?

A. Well, not accurately. I can come pretty close to it.

Q. I think the Court will tell you that if you cannot recall it you may refresh your recollection from the entry, if the entry was made at that time.

A. The entry was made as soon as the experiment was over. The ship came to a dead stop in two minutes and 25 seconds; and she traveled a distance of 1512 feet or 1514 feet, or within a few feet of that, anyway. [389]

Q. Refresh your recollection from the log and see what distance you have there, or see if the distance that you have now given us is there recorded.

A. 1,512 feet; yes, sir. The time was 2 minutes and 50 seconds. There was another time when we stopped in 2 minutes and 25 seconds. I don't think the ship had as much displacement on that voyage as on this one. She would naturally stop quicker.

The COURT.—Q. Can you recall the distance it took you to stop her when the distance was 2 minutes and 25 seconds, what distance you traveled?

A. The distance we had at that time was not as accurate as this. We took it by the log. It was something like 1,300 feet. The displacement of the ship was about 2,000 tons difference.

Mr. CAMPBELL.—Q. At the time you made the experiment that is recorded in the log, how did the trim of your vessel compare with that on the day of

(Testimony of C. F. Parker.)

the collision with the "Necanicum"?

A. Very nearly the same.

Q. How did the weather conditions compare?

A. Identical; the sea was smooth. There is still another one here somewhere.

Mr. CAMPBELL.—That is all.

Cross-examination.

Mr. DENMAN.—Q. Take the designation south-east one-half east, that is, half a point east of south-east, is it not?

A. Yes, sir.

Q. As you come around, what is the next point of the compass from southeast?

A. Coming around which way?

Q. Coming around toward the south?

A. Southeast by south.

Q. And coming around still further, what is the next point? A. South southeast.

Q. And what is the next point?

A. South by east.

Q. And what is the next point?

A. South. [390]

Q. And the next? A. South by west.

Q. And what is the next?

A. South southwest.

Q. And what is the next?

A. Southwest by south.

Q. How about south by west?

A. I told you south by west before south southwest.

Q. What is the distance in points between south-east by south and south by west one-half west?

(Testimony of C. F. Parker.)

A. $41\frac{1}{2}$ points.

Q. I notice here that the ship, at the time of this experiment, was a foot less by the stern than she was at the time of the collision; is that correct?

A. I could not say that offhand; I don't remember the exact draft on either occasion, but it was somewhere near the same, I know. That is the reason we made the experiment. I know that the displacement was very nearly the same, because I took it off the displacement scale at that time.

Q. And were you running before the wind, or against the wind? A. There was no wind.

Q. "Clear light northwest wind" is the notation here?

A. If I remember rightly, there was no wind; there might have been light air.

Q. It says here "wind."

Mr. CAMPBELL.—It says "light wind."

A. Wind variable, 1, 2; that would be light air. Wind northwest 2; that would be light breeze.

Mr. CAMPBELL.—Q. What do you mean by "2"— the Beaufort scale?

A. The Beaufort scale, yes, sir.

Q. What is that in inches?

A. About 4, I think—3 to 4.

Mr. DENMAN.—That is all.

Mr. CAMPBELL.—I should like to have that record go in.

Mr. DENMAN.—I don't care to have it go in; it is hearsay.

Mr. CAMPBELL.—All right. [391]

Mr. DENMAN.—I would like to make the experiment with your boat, and offer you our boat for such experiments and demonstrations as you may care to make with regard to the turning power of either. Our vessel is in port, and will be in trim by Wednesday or Thursday of next week. We will give you our boat. I would like to have a similar courtesy with your vessel when she is in port, to make these experiments.

Mr. CAMPBELL.—I cannot agree to take a 5,000 ton ship that is on a regular run and turn her over to you for experimental purposes. You have a steam schooner that I happen to know is tied up at the dock—or at least that is not busily engaged, and you could perhaps do that. Now, if you will join with me in a request to the Court to designate a shipmaster whom the Court shall appoint, and you will pay the expenses of that man, we will send him aboard the “Beaver” on a trip from here to Portland and back, we will permit him to put that ship through those maneuvers, under similar weather conditions, if they can be found to exist.

Mr. DENMAN.—The great trouble about that is, that you have to have somebody in the engine-room and you have to have somebody at the wheel; you will have to have four or five men.

Mr. CAMPBELL.—Well, you can put a man in the engine-room, too, provided that you pay his expense. And I think I can assure you that we will not charge anything for transportation. We cannot turn over a

ship to you, though, to make those experiments with outside.

Mr. DENMAN.—We could make the experiment right here in the bay.

Mr. CAMPBELL.—Oh, no; in a crowded harbor you could not do that. [392]

Mr. DENMAN.—We have a stretch here of 20 miles where we could make the experiment.

Mr. CAMPBELL.—If you want to put your men on board the ship as I have indicated, you can do it. I can assure you that there will be no expenses, either for transportation, or for meals. I will turn it over to you on a regular voyage when she is laden down. But I think it is asking too much to take the “Beaver” off her regular run like that; the “Beaver” is on a regular run between Portland and Los Angeles; her time is very much occupied in port; she does not have any more than just sufficient time to unload and to load her cargo and get away. I think that this offer is a fair offer. I am willing to have any competent shipmaster whom the Court may appoint go and conduct these experiments. I don’t see how I can be fairer than that.

Mr. DENMAN.—I know there is a good deal of fairness in that. You may have our boat to make such experiments as you want right here in the bay. Of course, I cannot go to Portland in order to make those experiments.

The COURT.—Well, gentlemen, there is so much we can do while we are in session besides negotiating, that I think as long as we remain in session we ought to attend to those matters, and you can do your

negotiating outside. Now, what had we better do? Do you want to resume this hearing in the morning?

(By consent, the further hearing of this cause was thereupon continued until Tuesday, October 20, 1914, at 10 A. M.)

[Endorsed]: Filed Jul. 19, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [393]

In the District Court of the United States for the Northern District of California, First Division.

Before Hon. M. T. DOOLING, Judge.

No. 15,513.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY (a Corporation),

vs.

The Steam Schooner "NECANICUM," Her Tackle,
Apparel, etc.

No. 15,675.

LEGGETT STEAMSHIP COMPANY (a Corporation),

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY (a Corporation),

Tuesday, October 20th, 1914.

Testimony of George Roffler, for Libelant.

GEORGE ROFFLER, called for the libelant,
sworn.

Mr. CAMPBELL.—Q. How old are you, Mr. Roffler?
A. Past 60, sir.

(Testimony of George Roffler.)

Q. What is your business?

A. Going to sea—a sailor.

Q. How long have you been going to sea?

A. Ever since I was 15 years of age.

Q. Were you on board the steamer “Beaver” at the time of her collision with the steam schooner “Necanicum”? A. Yes, sir.

Q. Where were you at the time of the collision?

A. I was at the wheel.

Q. What was your position on the “Beaver”?

A. Quartermaster.

Q. How long had you been steering the “Beaver” prior to the collision? A. Oh, for about two years.

Q. On this day, I mean—when did you go on watch at the wheel? A. At 2 o’clock. [394]

Q. What pilot-house compass course did you have her on prior to the collision?

A. Southeast $\frac{3}{8}$ east.

Q. Did you hear any whistles blown by the “Beaver” prior to the collision?

A. I heard one whistle.

Q. What was that one whistle, what kind of a whistle?

A. A short blast, a fog whistle I think it was; I took it to be, as near as I could make out, that it was a fog whistle; it was a long ways off.

Q. I am speaking now of the “Beaver’s” whistle; had the “Beaver” been blowing fog whistles prior to the collision?

A. Yes, sir; the automatic whistle.

Q. Did you hear any passing signals blown by the

(Testimony of George Roffler.)

“Beaver” prior to the collision? A. Yes, sir.

Q. What were they, what did you hear?

A. One whistle twice.

Q. What passing whistle was it? Which way did it call upon your vessel to turn?

A. A single blast of the whistle, and again once; the passing whistle was blown twice, one blast of the whistle each time, a short blast.

Q. And which way would that whistle call for your vessel’s head to turn?

A. To port, to put the wheel apart.

Q. Which way would that turn the head of your vessel?

A. To starboard; the ship’s head would swing to starboard on the port wheel.

Q. Did you receive any orders to port your helm?

A. Yes, sir.

Q. Was that before or after the passing whistles were blown by the “Beaver”? A. Afterwards.

Q. Did you obey the order? A. Sure, sir.

Q. Which way was the bow of your vessel swinging at the time of the collision, when the two vessels came together? A. To starboard. [395]

Q. Had you changed your course at all prior to the first time that the “Beaver” blew a passing signal?

A. No, sir.

Q. Did you see the “Necanicum” prior to the collision? A. Well, yes.

Q. Did you see the two vessels strike?

A. Yes, sir.

(Testimony of George Roffler.)

Q. At about what angle did the "Necanicum" approach the "Beaver"?

A. As near as I could see from the wheel from where I was standing, I stood on the starboard side of the wheel, at about right angles.

Q. At a right angle? A. Yes.

Q. Can you show us in this photograph, photograph "F" in "Libelant's Exhibit 4," the pilot-house windows; can you see them? Have you got your glasses?

A. I don't need them, sir. Yes, I can see the pilot-house windows.

Q. Will you just point them out to the Court?

A. Here they are.

Q. Which side can you see there?

A. The pilot-house is way up top, there are eight windows in front.

Q. Which side of the pilot-house were you standing on at the time of the collision?

A. The starboard side. There is nothing in the way there and I can see; no matter how many passengers are standing on the bow you can see ahead of them.

Mr. CAMPBELL.—That is all.

Cross-examination.

Mr. DENMAN.—Q. Do you remember testifying before the United States Inspectors?

A. Well, yes.

Q. Do you remember telling them you did not see the "Necanicum" before the collision?

(Testimony of George Roffler.)

A. I don't remember that.

Mr. CAMPBELL.—Just a moment, please. If the question is asked as an impeaching question, if your Honor please, I ask that the language of the witness before the Inspectors be put [396] to him. I think the rule requires that presentation in an impeaching question.

Mr. DENMAN.—Q. Do you remember testifying before the United States Inspectors? A. Yes, sir.

Q. That was at a hearing to determine the charges against the captains, was it not? A. So I believe.

Mr. CAMPBELL.—Is that right? Just a moment, Mr. Denman. Is that correct? Wasn't it to ascertain whether any charges should be preferred?

Mr. DENMAN.—Q. It was only at one hearing you testified? A. Yes.

Q. You only went there once? A. Yes, sir.

Q. Do you remember the question being put to you whether you saw the "Necanicum" at all before the collision and your statement under oath at that time that you did not see her before the collision?

A. I remember stating that I saw her. I remember stating that I saw her at a certain angle striking the ship.

Q. Before the United States Inspectors?

A. Yes, sir.

Q. Go on and tell exactly what you stated there.

A. That is a year ago and I could not remember that. I had no paper or pencil there to note down the things that I said there.

(Testimony of George Roffler.)

Q. Do you remember making the following statement:

“Q. What was it, referring to a whistle from the other side? A. One whistle, yes, it appeared to me from dead ahead. Q. How did it sound to you? A. It sounded ahead. Q. Did you see anything of her before the collision? A. No, sir.”

Q. Do you recall that testimony? A. No, sir.

Mr. DENMAN.—I will make a showing as to that.

Q. When you first made a report of this to the company and signed a report, what did you do with that signed report? [397]

Mr. CAMPBELL.—I object to that upon the ground that it assumes a fact not in evidence in this case at all. There is no evidence that he made any report or signed any report.

Mr. DENMAN.—Q. Did you sign a statement of the happenings at the time of the collision and give it to the company, or to its lawyers? Did you ever sign any statement about it?

A. Not that I remember, sir.

Q. Did you go to the company's office and give an account of the collision after it occurred?

A. It is a year ago since and I could not remember.

Mr. CAMPBELL.—He came to my office, Mr. Denman, but no written statement was taken from him.

Mr. DENMAN.—Q. But did you make any statement, any written statement?

A. Not that I know of.

(Testimony of George Roffler.)

Q. You say that you heard a fog-signal, what appeared to be a fog-signal, coming in from ahead?

A. Yes, sir.

Q. That was a single long blast, was it?

A. Yes, sir.

Q. And that was just before your vessel sounded the passing signals? A. Quite awhile before that.

Q. Quite awhile before that? A. Yes, sir.

Q. A couple of minutes perhaps?

A. Yes, perhaps.

Q. Probably about two minutes?

A. It may be probably more. It is hard to remember such things as that when it comes to minutes.

Q. But you have a distinct memory that you heard it? A. I heard one whistle.

Q. And you thought that it was a fog-signal and it came before you gave your passing signals; that is correct, is it? A. Yes, sir.

Q. The only signals that your vessel gave, as I understand it, [398] were two single passing signals? A. Yes, sir.

Q. No other whistles were blown at all from your vessel except the fog-signals? A. The fog-signals.

Q. And these two single whistles?

A. The port signal, one blast of the whistle.

Q. And those are all that your vessel blew; that is correct, is it not?

A. No, sir; there were three short blasts of the whistle when reversing the engines, to notify him that our engines were going astern.

(Testimony of George Roffler.)

Q. Did your engines go astern?

A. I think they were. You cannot prove that from me. I was at the wheel; I could not look over the side.

Q. But could you feel the jar?

A. You could scarcely feel it.

Q. How long before the collision was it that these three whistles were blown?

A. Very, very little; probably $\frac{1}{2}$ a minute or so.

Q. Could it have been as much as two minutes?

A. Oh, certainly not; 2 minutes is quite an item in a collision.

Q. Those three whistles came just after the second passing signal, did they not? A. Yes, sir.

Q. How long do you suppose you run along on the second passing signal before the three whistles came—a quarter of a minute? It was a very short time, was it not? A. Very, a very short time.

Q. And the two passing signals came very close together, did they not? A. Very close; yes, sir.

Q. About a quarter of a minute apart, were they?

A. It is hard for me to say.

Q. Well, in that neighborhood?

A. Well, somewhere around there; yes, sir. We have a clock there, but I have no pen or ink [399] or pencil there to note it down, and a year is a long time to remember.

Q. And it is not your business to do that anyway, is it? A. It is none of my business; no, sir.

Q. You think then that the whole time between

(Testimony of George Roffler.)

the first signal and the collision would be less than a minute? A. Yes, sir.

Q. You do?

A. Yes, sir; it was a very short interval.

Q. And you had been blowing your fog-signals steadily before that, had you?

A. Yes, sir; that is, the automatic signal, off and on, because the fog was a kind of a shifting fog, it would close up and lift again and—

Q. (Intg.) But for twenty minutes before the collision—

Mr. CAMPBELL.—Let him finish his description, Mr. Denman.

Mr. DENMAN.—I thought he had finished. Go ahead.

A. (Continuing.) We had fog pretty much right along but it would lift for a few minutes and you could see for a couple of miles and then it would shut down again.

Q. It would shut down quite close? A. Yes, sir.

Q. So you could not see more than two or 300 yards?

A. Oh, no, it was not as thick as that; you could always see half a mile or a mile; sometimes you could see 3 or 4 miles either side of you.

Q. You do not know how far your vessel was run, do you?

A. We were probably 20 miles below Point Arena.

Q. You don't know at what speed you were running, do you? A. I could not say.

(Testimony of George Roffler.)

Q. Do you remember when the captain came on deck?

A. I heard the second mate call him, it was shutting in very thick, and he came up. [400]

Q. Well, that is correct, is it not, it was shutting in very thick then, was it not?

A. It was then pretty thick; yes, sir.

Q. And that continued up to the time of the collision? A. Well, yes.

Q. The mate continued to give you the orders after the captain came, didn't he?

A. No, sir; I got orders from the captain to put the wheel apart, and hard over, which I did. The second mate was on the bridge at the time but he had nothing whatever to say to me, and in fact did not say anything.

Testimony of David W. Dickie, for Libelant.

DAVID W. DICKIE, called for the libelant, sworn.

Mr. CAMPBELL.—Q. What is your name?

A. David W. Dickie.

Q. What is your business?

A. Engineer and naval architect.

Q. How long have you been a naval architect and an engineer?

A. I have been in the business, associated with my brother, since 1906, since Christmas.

Q. Altogether how long have you been in the business?

A. I have been in the business since I was 16 years old.

(Testimony of David W. Dickie.)

Q. At what plants did you work as such?

A. I served at the Union Iron Works six years in the various shops, such as the boat-shop, iron and shipfitting, ship-carpenter and ship-joiner shops. From there I was two years in the drawing-room, on the hull side. After that I took the Government examination and took the position of draftsman in the Navy Department, Naval Constructor's office, stationed at the Union Iron Works. I took an examination then and was promoted to Chief Draughtsman, in charge of the Battleship "Nebraska," at the Naval Constructor's office, in the office of Moran Brothers, Seattle, Washington. From there I resigned and I went to Scotland, to the Glasgow University, staying [401] there two terms, working in the meantime in the Clyde Banks Shipbuilding Company at Clyde Banks. Returning to this country I was employed by the New York Shipbuilding Company for a short while and I then went up to the Falls River Ship & Engine Company at Quincy, Massachusetts. I was employed in various concrete work for a short while, and for awhile was Assistant Engineer of Works at the National Cash Register Company at Dayton, Ohio. In 1906, at Christmas, I joined my father, Mr. James W. Dickie, in his business and—

Q. What business was that?

A. Engineer and naval architect, in a little wooden building down on Steuart Street, which he occupied temporarily after the fire. I joined my brother just toward the end of 1906 and the beginning of 1907 in

(Testimony of David W. Dickie.)

the business which we now have.

Q. Did you make an examination of the steamer "Beaver" on or about the 1st day of November, following her reported collision with the steam schooner "Necanicum"?

A. Yes, sir; about that time I examined the steamer "Beaver."

Q. At whose request was that examination made?

A. That examination was originally requested by the Moore & Scott Iron Works who wished me to make an estimate of the cost of repairs for them in order that they might use my estimates for the purpose of putting in a bid to get the work. Part of my examination was made while she was alongside of the wharf down town, and the rest of the examination was made at the Union Iron Works Drydock at Hunter's Point one Sunday morning. After that I was requested by Mr. Campbell at the dock to make an examination and a report for him.

Q. I hand you a series of photographs, marked "Libelant's Exhibit 4," and ask you who, if you know, took them? [402]

A. These are copies of photographs which I took Sunday morning at the dock.

Q. Will you describe to us in detail, Mr. Dickie, the damage you found to have been inflicted upon the "Beaver" by the collision?

A. On the port side of the "Beaver" there was quite an extensive indentation about 10½ feet to 12 feet from the stem. The bow of the vessel was bent

(Testimony of David W. Dickie.)

over to port. The region of the vessel in wake of the anchor was very badly smashed and crushed. The two decks and the peak-tank top were both badly crushed, The center line bulkhead below the peak-tank top was badly bent. Several of the frames, ranging from about No. 3 to No. 9 or 10, or thereabouts, were badly bent and ruined so that they had to be repaired. The shell plating was cut and buckled apparently by contact with another vessel.

Q. What damage was there on the starboard side, if any?

A. The damage on the starboard side was principally represented by a knuckle being bent in the vessel from the upper or spar-deck down almost to the keel.

Q. What do you mean by knuckle?

A. I mean by a knuckle the sharp, sudden bend in the plating where it departs from a fair line. The lower plates were cracked so badly and opened that the water was flowing out of the crack when the water in the dock got below the line of the crack in the plate.

Q. Is that shown by any of these photographs?

A. The photograph marked "B" shows the water flowing out through the crack in the lowest plate on the forefoot; and the photograph marked "G" shows the water flowing out through the crack quite plainly.

Q. Can you show on any of the photographs the line of the knuckle that you speak of on the starboard side? [403]

A. On the photograph "C," the line of the knuckle

(Testimony of David W. Dickie.)

shows quite plainly as a shadow, which I am marking "knuckle" with my initials.

Q. Just show it to the Court.

A. This is it (indicating).

Q. Did you take any measurements of these various disturbances in the plates, frames, decks, stem and so forth?

A. Yes, sir; I took very accurate measurements of the whole thing for the purpose of making an estimate.

Q. Did you subsequently prepare a blue-print showing the detail of the damage? A. Yes, sir.

Q. Have you a copy of that with you?

A. Yes, sir. I have here a blue-print, No. 302-E, which shows, at the right-hand end the port side of the steamer "Beaver," and at the left-hand end the starboard side of the steamer "Beaver"; and in the lower right-hand corner a plain view of the upper deck, main deck and peak-tank top, showing the indentations and the knuckle on both sides of the vessel.

Q. Will you point out to the Court on the blue-print, taking the port side first, the damage which you have previously described?

A. Yes, sir. The plan shows a view of the port side of the vessel. The top part of it representing the woodwork of the spar deck or upper deck. This heavy dotted line marked "main deck sheer-strake" represents the location of the main deck. Another heavy dotted line marked "Top of peak-tank" represents another deck which is lower down and which is on top of a tank which is composed of the lower part

(Testimony of David W. Dickie.)

of the vessel and is bounded by a bulkhead which is on frame 12 which is across the ship, and—

Q. (Intg.) Just a moment; what is the bulkhead called? [404]

A. The bulkhead is called the collision bulkhead, on frame 12. The part of the vessel forward of frame 12 and below the top of the peak-tank and between the two sides of the vessel is called the peak-tank. This view extends down to the bottom to frame 20, where the line of the forefoot intersects with the keel.

Q. Where is the line of the keel?

A. The line of the keel extends from frame 20 aft and runs off the edge of the paper at the right-hand end. And the draft marks shown on the left-hand side of the port side view are the draft marks as taken from the vessel, and represent 9 feet, 10 feet and 11 feet; the 10 being omitted in all these numbers up until you get to 20. The lines which come down along frame 7, a heavy irregular line, drawn with a pen, and the other line beginning at the top of frame 3 and extending down irregularly across the vessel to just aft of frame 5 at the bottom, and the other line extending just forward of frame 6 represent the indentation which occurred in the vessel due to the steam of the "Necanicum." Looking at the plan view—

Q. Just before we reach that, Mr. Dickie, can you point out the indentation you have just described, on the photograph, "Exhibit 4"?

A. Photograph A, of "Exhibit 4," shows the indentation beginning at a point marked X, which

(Testimony of David W. Dickie.)

comes down across the hawse-pipe, and showing not quite distinctly the folds at the bottom; then it goes up again just forward of the anchor and out through here. It is shown better on photograph "D," "Libelant's Exhibit 4," which shows the outside line of the indentation. The outside line of the indentation on photograph "D" of "Exhibit 4" corresponds to the line which runs along frame 7 on the blue-print. The same thing shows on photograph "E," "Exhibit 4," and photograph "F" of "Exhibit 4." The view from [405] the top, taken from the masthead, shows the shape of the indentation on the photograph marked "L," "Exhibit 4."

Q. The shape at what point?

A. The shape at the upper deck.

Q. I hand you another large photograph and ask you whether that also shows the shape of the indentation?

A. The large photograph which you have just handed me does show the shape of the indentation.

Mr. CAMPBELL.—I offer that in evidence. A copy of it was identified last night by Captain Pillsbury upon the taking of his deposition.

(The photograph was here marked "Libelant's Exhibit 7.")

Mr. DENMAN.—I would like to cross-examine him on that for a moment before it is put in evidence, if I may.

Mr. CAMPBELL.—As to what the photograph shows?

(Testimony of David W. Dickie.)

Mr. DENMAN.—I want to ask him if it shows the condition.

Mr. CAMPBELL.—I prefer to have your cross-examination, Mr. Denman, after I finish with the direct examination, unless it goes to the question of the admissibility of that photograph.

Mr. DENMAN.—It may; I don't know what it may develop until I examine it.

Mr. CAMPBELL.—We went through that same seance last night on this photograph.

Mr. DENMAN.—I don't know what seance you refer to. I certainly desire to examine the witness.

Mr. CAMPBELL.—Go ahead.

Mr. DENMAN.—Q. Do I understand you, that that shows the forward face of the angle of the bend into the ship or only the after face?

A. To the best of my knowledge and belief that [406] shows the after face. I did not take that photograph.

Mr. DENMAN.—That is all.

Mr. CAMPBELL.—Q. Now, continue, Mr. Dickie, on the matter which you were about to describe when I interrupted you, referring to the deck lines which you have drawn?

A. In the lower part of the drawing there is a line marked "center line of deck plan" which represents the center line of the ship as she was before any abrasion took place. On the right and left-hand sides are three irregular lines marked "upper deck," "main deck" and "peak-tank top," both on the right-hand side and on the left-hand side. This view is

(Testimony of David W. Dickie.)

taken looking down, consequently the left-hand side of the drawing represents the port side of the ship and the right-hand side of the lower drawing represents the starboard side of the ship. I will mark on this drawing, in yellow pencil—

Q. Just a moment. I wish you would show on the drawing the original lines before there was any damage done to the vessel; that is to say, the position of her stem and the lines of the upper deck with respect to the center line of the vessel.

A. Yes, sir. I will mark on the drawing the position of the stem on the upper deck and will continue out the line of the upper deck to that position in order to clear this drawing; so that it now shows on the port side of the vessel the amount of indentation which took place from the original line of the upper deck to the new line of the upper deck as shown by this drawing. It also shows on the starboard side the amount which the stem was drawn over or knocked over by the impact, to the new position on the port side of the vessel.

Q. What did the irregular lines abaft the stem, marked 1, 2, 3, 4, 5, and 6, down to 7, indicate? [407]

A. The irregular lines indicated the shape of the shell-plating on a section taken through the ship in a horizontal plane through the three planes as indicated by the marks on the drawing "Upper deck," "Main deck" and "Peak-tank top."

Q. As the lines are now drawn in their irregular form, what do they indicate?

A. Well, to the lay mind they would indicate the

(Testimony of David W. Dickie.)

edge of the deck if the upper part of the ship were removed.

Q. How much was the upper part shoved in, or what was the penetration, on the upper deck?

A. The depth of the penetration on the upper deck is approximately 3 feet 10½ inches.

Q. Can you show me on the deck lines to which you have been referring the knuckle which was caused on the starboard side by the blow?

A. On the starboard side the knuckle shows quite plainly opposite frame 4 in all three decks. On the peak-tank top the knuckle came a little bit aft of the point—

Q. (Intg.) Mark them A, B, and C.

A. I am now marking them A, B and C.

Q. How much was the stem set over to port?

A. The stem was set over to port about 1 foot 6.

Q. Now, Mr. Dickie, from your examination of the damage done to the “Beaver” were you able to determine the point at which the initial impact between the two vessels came?

A. The point of impact which I determined—

Q. The question is, were you able to determine that?

A. I believe I am able to determine it.

Q. What is your judgment about it?

A. My judgment in the matter is that the point of impact was at the point frame 4 on the original position of the line and that the impact was in a direction from 45 to 50 degrees from the center line which is indicated by that arrow marked D. [408]

(Testimony of David W. Dickie.)

Q. Did you make any examination of the "Necanicum"? A. Yes, sir.

Q. Did you see her stem?

A. When I got there the wood part of the stem was practically all trimmed away and the only thing that was showing was the bent fastening, which was bent over to port.

Q. Did you see the planking on the forecastle-head and below the deck?

A. Yes, sir; the planking on the outside was damaged apparently by the flukes of the anchor.

Mr. DENMAN.—Q. Which side?

A. On the port side.

Mr. CAMPBELL.—Q. At about what angle, in your judgment, did the two vessels come together with respect to the contour of the outer edge of the upper deck?

A. The center line of the "Necanicum" came very nearly at a right angle to the contour of the upper deck of the "Beaver."

Q. And when you say they struck at an angle of 45 to 50 degrees, that was with respect to what, as the base? A. The center lines of both vessels.

Q. I now exhibit to you two photographs which have been offered in evidence and stated to have shown the condition of the "Necanicum's" stem as she came into port—

Mr. DENMAN.—I don't suppose you are going to use Mr. Evers as a witness, are you, Mr. Campbell?

Mr. CAMPBELL.—Yes, I am. I was not con-

(Testimony of David W. Dickie.)

scious that he was in the courtroom. I am glad you called my attention to it.

Q. Have you examined those photographs?

A. Yes, sir.

Q. Did you take any measurements off from the "Necanicum"?

A. Yes, I took the shape of the bow of the "Necanicum."

Q. Have you made a drawing of that?

A. Yes, sir. It is torn here; I had it pasted here.

[409]

Q. I will identify this by writing on the bottom "Shape of bow of 'Necanicum'." Is that drawn to scale?

A. Yes, sir; half-inch scale, the same as the blueprint.

Q. Where did you obtain the measurements?

A. From the ship. I went right aboard the ship. The measurements are all given on there.

Mr. CAMPBELL.—I offer that in evidence so that we may speak of it as an exhibit.

(The document was here marked "Libelant's Exhibit 8.")

Q. I wish you would take this drawing which you have made of the shape of the bow of the "Necanicum" and apply it to the contour line of the upper deck of the "Beaver," as that line was prior to the collision or at the moment of impact so as to show the angle at which the two vessels came together as you have stated it in your judgment. Will you draw the outline of the bow of the "Necanicum"?

(Testimony of David W. Dickie.)

A. Yes; I am marking this "Outline of 'Necanicum'." That represents, in my judgment, the angle of impact of those vessels.

Q. Where did the impact come with respect to frame No. 4?

A. The impact I believe came right opposite frame No. 4 in the original position of the contour of the upper deck.

Q. Will you just extend that line, please, extend the line of frame 4 so as to show that. A. Yes, sir.

Q. What fact or facts led you to the opinion that the point of impact was as you have fixed it?

A. Two things; one, there was a mark on the vessel at about that point showing a very strong impact there; and the other thing is that when the position of the frames is laid in on the original contour line and these distances measured off and laid in on the contour line after the damage the point of damage corresponds to the point of contact after it is pushed [410] back into the indentation in the "Beaver."

Q. Where, in your judgment, would the greatest blow come—where the vessels first touched or where they subsequently may have touched by a slipping of one along the other?

A. The greatest blow would come where the vessels first touched.

Q. Has the knuckling or the bending of the plates on the starboard side anything to do with showing the point of contact on the port side?

A. As I see it, it has. If I had a piece of paper I could illustrate what I mean by that. You roll up a

(Testimony of David W. Dickie.)

piece of paper and then hit it at a point like that; it tends to break and the end tends to come around. That is just exactly what has happened in this case, one vessel has struck the other, on frame 4, and the end due to the impact has come around, and then the general crumpling and drawing together of the material has pulled the rest of the way.

Q. Where, in your judgment, would you expect to find a buckling or knuckling on the starboard side when the blow came on the port side?

A. The knuckling in the case of the "Beaver" would come on frame 4 on the starboard side, for the reason that there was a partition bulkhead on frame 4 which extended from the upper deck down to the main deck and stiffened the vessel at that point and produced an ending of all strains or a change of shock of all strains at that point.

Q. Where did the knuckling come with respect to frame 4? A. The knuckling came just at frame 4.

Q. You have fixed the point of impact; I notice that on the contour lines of three decks there is shown a wavy condition forward of the point of impact; do you understand what I mean? A. Yes.

Mr. DENMAN.—That is, what he says is the point of impact. [411]

Mr. CAMPBELL.—Yes.

Q. How do you account for the waving in those lines?

A. I account for the waving in those lines by the crumpling up of the material due to the blow of the other vessel. Steel is different from wood. When

(Testimony of David W. Dickie.)

you strike wood it shatters, as indicated by the photograph of the "Necanicum"; whereas the steel crumples up like a piece of newspaper and must deploy itself out in a riffled or some condition which will permit the metal to come together.

Q. Take the crumpled condition of the plating shown forward of frame 4, where does the indentation come,—at the frames or between the frames?

A. Between the frames always.

Q. Why would you expect the crumpling to take such form as the indentation would come between the frames instead of at the frames?

A. Because you have a rigid frame supporting it at equal intervals of 2 feet, I think it is in this case, and the general way for these indentations to occur is for the indentation to be inward in one frame and outward in the next frame, and so on, so that the bending movements equalize one another as they cross the frame.

Q. How do you account for the apparently distorted and riffled condition of the contour lines abaft of what you fix as the point of impact?

A. There are two ways of accounting for that; one was that the "Beaver" had some headway on her at the time of the impact; another is that the "Beaver" rolled or must have rolled to starboard and allowed the stem of the "Necanicum" to penetrate her at this point, and caused further damage due to her being at an angle of 45 degrees.

Q. When you say "this point" where do you fix that—at that line?

(Testimony of David W. Dickie.)

A. I have not marked on this drawing the [412] draught of the vessel, but I understand that—

Q. Assume the draught of the “Beaver” was approximately 19 feet.

A. Assuming the draught of the “Beaver” at 19 feet—

Q. And the “Necanicum” at 4 feet?

A. And the “Necanicum” at 4 feet, the stem of the “Necanicum” would be represented by this line which I have drawn on here in yellow pencil. You will note that the approximate location of the stem of the “Necanicum” as she was given here approximates very closely with the line of this riddle which is shown marked down below as “peak-tank top” and which goes right through this point here at the top of the peak-tank as marked in the center of the drawing.

Q. How do you account for any distortion in the plates of the “Beaver” below the line of the keel of the “Necanicum”?

A. The upper part of the structure of the “Beaver” down to the point of the bottom of the keel of the “Necanicum” had been bent over to port and it being a more or less rigid structure, for purposes of illustration, the break followed on down until it came to the bottom of the keel as the vessel is very fine below that point.

Q. How do you account for the bulging of the plates on the starboard side, or the knuckling of the plates on the starboard side down below the line of the keel of the “Necanicum”?

A. The knuckling would follow on down on the

(Testimony of David W. Dickie.)

plating until it came to a natural place to stop; the blow would knuckle it down to about the 16 foot draft mark, and the structure of the ship bending would carry the knuckle on down to the bottom.

Q. Would or would not the fact that paint was off the plating of the "Beaver" indicate that that paint had been taken off by a scraping of the "Necanicum" along the "Beaver's" side? [413]

A. Not necessarily because the paint may have been worked off the "Beaver" due to the action of bending the plates. If you take a piece of steel plate which is in a fair plane and have a coat of paint on it and then bend the steel plate that paint may or may not stay on the plate according to the quality of the paint and the time it has been on and the general action of the change of the material—of the steel.

Q. From your examination of these vessels, taking into consideration the condition of the stem of the "Necanicum" as shown by Claimant's Exhibits "C" and "D," I ask you whether or not, in your judgment, at the moment of impact the "Beaver" had any headway.

A. In my judgment the "Beaver" did have headway at the moment of impact.

Q. I ask you whether or not, in your judgment, the "Necanicum" had any headway.

A. Yes, sir; in my judgment she did have headway.

Q. In your opinion, based upon what you saw of the damage to the two vessels, and taking into consideration the photographs of the stem of the "Necanicum," I ask you whether or not the damage in-

(Testimony of David W. Dickie.)

inflicted upon the "Beaver" could have been done if at the time of collision the "Beaver" was dead in the water or going astern.

A. The damage to the "Beaver" could not have been done. The damage to the "Beaver" could have been done with the "Beaver" dead in the water and the "Necanicum" going ahead.

Q. Did I say the "Beaver" dead in the water?

A. Yes.

Q. I mean the "Necanicum" dead in the water. From what you saw of the damage to the "Beaver" and the damage to the "Necanicum," and taking into consideration the condition of the stem shown by the photographs of the "Necanicum," could or could not the damage done to the "Beaver" have been inflicted upon her [414] if the "Necanicum" was dead in the water at the moment of impact?

A. I do not believe the damage to the "Beaver" could have taken that form if the "Necanicum" had been dead in the water.

Q. What momentum or what velocity or what speed on the part of the "Necanicum" would have been required, in your judgment, to have inflicted that character of damage?

A. From the nature of the damage I came to the conclusion that the speed of the "Necanicum" was to the speed of the "Beaver" as about $1\frac{1}{2}$ to 2.

Q. Which would be the $1\frac{1}{2}$?

A. The "Necanicum" would be $1\frac{1}{2}$ and the "Beaver" would be 2.

Q. In your judgment, what speed would you fix

(Testimony of David W. Dickie.)

as the speed of the "Necanicum" at the time of the collision? A. About one knot an hour.

Q. If prior to the collision the "Beaver" had the "Necanicum" on her port bow and if at that time the "Beaver" was swinging to starboard under a port helm, could the collision have taken place and the damage have been inflicted upon the "Beaver" that was done to her unless at the moment of impact the "Necanicum" had headway? A. It could not.

Q. If prior to the collision the "Beaver" had the "Necanicum" on her own port bow and if thereafter and before the collision the "Beaver" swung to starboard under a port helm, could the collision have taken place and have inflicted the damage done to the "Beaver" without the "Necanicum" having headway at the moment of impact? A. It could not.

Mr. DENMAN.—Of course, there has been no showing that this gentleman is a navigator.

Mr. CAMPBELL.—I am asking him his opinion based on what he has already shown. [415]

Mr. DENMAN.—I object to it upon that ground.

The COURT.—The objection is overruled.

Mr. CAMPBELL.—Q. Could, in your judgment, the collision have taken place at all if prior to the collision the "Beaver" had the "Necanicum" on her own port bow and at that time or at any moment prior to the actual impact the "Beaver" was swinging to the starboard under a port helm and the "Necanicum" dead in the water?

A. No, the collision could not have taken place at all.

(Testimony of David W. Dickie.)

Mr. CAMPBELL.—I desire to offer in evidence at this time, if the Court please, a deposition taken before—well, I will ask that it be published so that we may get the name of the notary.

Mr. DENMAN.—Are you through with Mr. Dickie?

Mr. CAMPBELL.—No. I offer in evidence the deposition of Theodore J. Hewett, taken before John P. Hannon, a Notary Public of the State of Oregon, and certified to under his hand and seal on the 13th day of October, 1914.

Mr. DENMAN.—May I see it, please, Mr. Campbell?

Mr. CAMPBELL.—Q. Now, I exhibit to you, Mr. Dickie, an exhibit attached to the deposition of Mr. Hewett and ask you to look at it. If prior to the collision the “Beaver” and the “Necanicum” were in the respective positions shown on the exhibit attached to Mr. Hewett’s deposition, and if at that time or thereafter the “Beaver” swung to starboard under a port helm, could or could not the collision have taken place if at the time of impact the “Necanicum” was dead in the water.

A. It could not.

Q. If prior to the collision the “Beaver” and the “Necanicum” were with respect to each other in the positions shown in the exhibit attached to Mr. Hewett’s deposition, and the “Beaver” [416] proceeded ahead straight on her course without swinging to starboard, could the collision have taken place without the “Necanicum” having headway at the

(Testimony of David W. Dickie.)

moment of impact? A. It could not.

Q. How do the positions of the two vessels as shown by Mr. Hewett on that drawing correspond with your belief as to the angle at which they came together?

A. As to the angle at which they came together, my belief is that this drawing is just about as I believe it to be.

Mr. CAMPBELL.—The deposition shows that Mr. Hewett was a passenger at the time of the collision, your Honor, and was standing at the point indicated at the time when he saw the two vessels, or at the time when he saw the two vessels, or at the time when he saw the “Necanicum.”

Q. What were the sizes of the beams in the “Beaver” at the point of damage?

A. 8 inches by $3\frac{1}{2}$ inches channel.

Q. What do you mean by a channel beam?

A. A channel beam is a beam that has a flat web, with two small webs, one at the top and one at the bottom for the purpose of giving it strength, and to which the deck is riveted with regards to the top one and to which stringers and other supports are riveted with regards to the bottom one.

Q. What were the sizes of her frames in that region?

A. The frames were 6 inches by $3\frac{1}{2}$ inches by 7/16th angle; and on every other frame, or alternate frames, there was fitted a 4-inch by 4-inch by 7/16ths inch reverse bar.

Q. Do you know the thickness of her steel decks,

(Testimony of David W. Dickie.)

that is, her main deck and her tank-top?

A. I have those notes somewhere but I have not marked them on the drawing. They were about $\frac{3}{8}$ ths.

Q. What was the width of her upper deck at the point of impact which you have fixed?

A. The width of the upper deck at the [417] point of impact is about 10 feet.

Q. And what was it at the tank-top?

A. At the tank-top it is about 6 feet; and at the main deck about 7 feet.

Q. What can you say of the strength or weakness of the structure of that ship in the region of the point of impact?

A. That ship was right up to Lloyds, right up to American Lloyds under which she was built.

Q. Would the strength of the beams in any way account for the buckling of the plates on the star-board side?

A. The strength of the beams and the strength of the decks would transfer the strain through to the other side; it was due to that strength of the structure that caused the blow to bend the end around.

Q. Will you describe to the Court the condition of the steel decks and tank-top as they lay there damaged?

A. As near as I can remember the steel deck was rolled up where it was crushed up by the stem, it was rolled over and crinkled; the deck itself was buckled in its form due to the blow.

(Testimony of David W. Dickie.)

Cross-examination.

Mr. DENMAN.—Q. You figured the relative speed and you say the speed of the “Necanicum” was, in your opinion, as indicated by the wounds, about a mile an hour?

A. The speed of the “Necanicum” was taken from the work I did on the “Beaver”—“Selje,” at the time of the “Beaver” and “Selje” case, and I did not go into it very thoroughly; but my judgment as to the speed, not from the wound, but from the distance that the vessel traveled into the wound, is that it was about a knot an hour. [418]

Q. And the other vessel was traveling $1\frac{1}{2}$ to 2 to that? A. Yes; just about that.

Q. So you would make it about a mile and a quarter, the other vessel?

A. It is a mile and a third, isn't it?

Q. Well, a mile and a third; that is correct, is it?

A. Yes, sir.

Q. And you figure the injury here was occasioned by the combined speed of $2\frac{1}{3}$ miles?

A. No; you have not taken into account the component of the angle of impact.

Q. Would it be less or more than that speed?

A. It would be less than that speed.

Q. What would you figure then as the combined speed of the two?

A. The combined speed of the two would hardly enter into it on account of the angle of impact but a mile and a half, in my judgment, and without looking into it thoroughly, would be the maximum you

(Testimony of David W. Dickie.)

could put it at, if you could put it at that much.

Q. Now, take the last exhibit in that deposition, and look at the exhibit at the end of that; I ask you to draw a line through the center line of each to the point of meeting. A. On this paper?

Q. Yes.

Mr. CAMPBELL.—So that we will not be confused, you are now drawing a line on an exhibit attached to the deposition of Mr. Hewett, are you, Mr. Dickie?

A. It is "Exhibit 1" attached to the deposition of Mr. Hewett. I have done so.

Mr. DENMAN.—Q. That is practically at a right angle—no, it is not; what would you make it, about 80 degrees? A. About 65 or 70, I should say.

Q. About 70 degrees. If the vessels are going at the rate you [419] have described, that collision would not have taken place at the point you have described under that chart, would it?

A. I believe he has misplaced his vessels a little.

Q. Oh, of course, I know, but I am asking you about that exhibit. It would not, would it?

A. Not exactly; no.

Q. It would either have gone completely astern of the "Beaver" or struck her about the stern, would it not, at the rate you have described as to the progress of the vessels?

A. No; I should say it would be in there about, marked "A" on "Exhibit 1" of Mr. Hewett's sketch.

Q. Now, supposing the "Beaver" were turning very rapidly to starboard, where would it be?

(Testimony of David W. Dickie.)

A. It would be a little different, but not very much.

Q. What would be the angle of impact if she were turning rapidly to starboard? It would be still nearer a right angle to the course of the two vessels?

A. Yes, sir.

Q. And probably 45 degrees further over than the angle you have estimated in your exhibit?

A. No, because you have not stated how far the vessel has swung as it is given here.

Q. Well, presuming she has swung 2 points?

A. That is $22\frac{1}{2}$ degrees?

Q. Yes.

A. Well, if she swung 2 points more that would make it about a right angle, then, according to that.

Q. So she would be striking at an angle of at least— A. (Intg.) 90 degrees.

Q. That would be 40 degrees abaft of the angle you have indicated in your theoretical drawing?

A. No. This angle in here now in this sketch is about 70 degrees. If you are going to swing 2 points more, which would be 22, that would give you 99, and that would be about 9 degrees aft of the square line which— [420]

Q. (Intg.) But it would be 49 degrees aft of the line you have estimated here, would it not?

A. Yes, sir; 49 degrees aft of that line.

Q. So that presuming now that the "Beaver" was turning rapidly to starboard during that time the angle of striking would be—and presuming that she turned 2 points in that time—the angle of striking would be 49 degrees more toward a right angle than

(Testimony of David W. Dickie.)

past it,—than the angle you have given as the angle of striking of the two vessels?

Mr. CAMPBELL.—That question assumes that Mr. Hewett has correctly laid down the distance that the vessels were apart.

Mr. DENMAN.—This is purely now on the question of angle.

Mr. CAMPBELL.—And without respect to distances?

Mr. DENMAN.—Yes.

A. Without respect to distances, and assuming all the assumptions you have made in your question, it would be about 49 degrees beyond the point which I have given you.

Q. Now, supposing the “Necanicum” was turning rapidly to starboard, could they come together, on the diagram shown here by this witness?

Mr. CAMPBELL.—Under what condition? With headway on the “Necanicum”?

Mr. DENMAN.—The headway of a mile an hour; the two headways you have indicated there. Supposing both vessels were turning rapidly to starboard, would they come together at all?

A. Well, the headway of a mile an hour was practically at the point of impact, so you would have to get a different headway at a point away from that.

Q. Suppose the point was 100 yards off?

A. If the “Necanicum” was turning rapidly to starboard, and [421] they were about 100 yards away, and were going at the speed which would correspond to the mile an hour at the point of impact,

(Testimony of David W. Dickie.)

and the "Beaver" were swinging rapidly to starboard, the chances are that they probably would pass.

Q. Have you ever made any experiments with any vessel of the "Necanicum's" type in turning as she goes under a reduced speed when reversing full speed astern from full speed ahead?

A. No, sir. The only ones I have been on have been the ferry-boats and these small boats we have designed.

Q. With a right-hand wheel, and a vessel reduced in speed from 8 knots to one, what direction would the bow of the "Necanicum" be inclined to turn?

A. You are presupposing that the engine is reversing now, are you?

Q. Full speed astern, yes, and with a right-hand wheel?

A. With a right-hand wheel, and the engine of the "Necanicum" reversing, the stern would eventually swing to port and the bow would swing to starboard.

Q. And that tendency would continue all through the period from the beginning of your application of the reversing power down to the end?

A. No; that would only manifest itself after a period of time had elapsed; when you first started to back the vessel the swinging does not take place right away.

Q. Have you ever figured on how long that period is? You don't know about the steam schooner type in that maneuver, do you?

A. Only by watching them along the wharf.

Q. You don't see that kind of a movement along

(Testimony of David W. Dickie.)

the wharf, do you? A. No.

Q. It is really only a kick, is it not?

A. Yes, sir.

Q. So that that would not be any test as to what would happen [422] from full speed ahead to full speed astern. You don't have that at the wharf, do you?

A. Your vessel would not be going full speed, but your engines would be.

Q. I say you don't have the full speed condition of the vessel at the wharf, do you? A. No.

Q. You are quite certain that the speed of the "Necanicum" could not have been above a knot, or thereabouts?

A. No, sir; I am not certain as to that because I did not go into that.

Q. Could it have been as high as 2 knots?

A. I don't think it could have been as high as 2 knots.

Q. You are pretty confident of that, judging from the wounds and the calculations you made?

A. I am merely judging from the work I did on the "Selje" and "Beaver" at that time, which was quite elaborate, that it would be about a knot.

Q. What would you say to this proposition, that the "Beaver" was going at the rate of 10 knots, and the "Necanicum" was going at the rate of 5 knots?

A. Well, I don't think either of them would have been here to tell the tale.

Q. You have never been a navigator, have you?

A. No, sir; not of anything over 15 tons.

(Testimony of David W. Dickie.)

Q. Do you know Captain Pillsbury?

A. Yes, sir.

Q. What is his occupation?

A. He is a marine sureyor now, but he is quite a well-known navigator.

Q. And for many years he has been a marine surveyor, has he not?

A. Yes, sir. For quite a few years he was with the Underwriters in San Francisco; now he is in for himself. [423]

Q. Supposing the "Beaver" is going 15 knots an hour, and her engines are put full speed astern, and that it takes 2 minutes and 50 seconds to stop her, what, in your opinion, would be her speed at the end of a minute and a half?

A. I have not the figures here with me, but if my memory serves me right it would come down, she would be going about one-third of the speed; the curve drops very rapidly at the start and then flattens out towards the end.

Q. That is to say, she would be going about 5 knots at the end of that period of time, a minute and a half? A. Possibly less than that.

Q. Possibly less than that; how much less?

A. I do not know exactly, but somewhere along in there; if I had anticipated a cross-examination along this line I would have brought all that data along.

Q. And between those two points what do you think she would be at the end of a minute, what rate, with a reversing propeller from 15 knots down?

A. That is, one minute from the time you got the

(Testimony of David W. Dickie.)

bell to reverse, or one minute from the start?

Q. One minute from the time you got the bell to reverse.

Mr. CAMPBELL.—It would depend on how quick the engineer acted, would it not? That would not be a fair test.

Mr. DENMAN.—Presuming he acted his quickest?

A. I should judge that the curve would come down at the rate of—assuming 15 knots, at full speed—at the end of one minute, which would be roughly one-third of the time, you would take off about 7 knots, which would leave you 8 knots; then at the next minute you would take off about 5, which would leave you 3. I think the curve would come down about in that form.

Q. Supposing she only ran $\frac{1}{2}$ a minute after you began to [424] reverse, about what would her speed be? That would be, say about one-fifth of the time?

A. Well, it would cut roughly about half of your 7 knots.

Q. So you would have a speed then of about around 11 or 12 knots? A. Something like that.

Q. At the end of $\frac{1}{2}$ a minute.

A. Yes, sir, somewhere along there. I can get the exact data and bring it in if you want it.

Q. What is the thickness of the material on the “Beaver” of the shell plating from the main deck up?

A. From the main deck up the thickness of the

(Testimony of David W. Dickie.)

material is approximately $\frac{3}{8}$ of an inch, or $\frac{7}{16}$ of an inch. I have that data somewhere, but I did not bring it with me. [425]

Q. What is it below the main deck, down to the tank-top?

A. From the main deck down to the tank-top, it would be thick, then a little thinner, then it would get thicker again at the bottom.

Q. How much is it at the bottom?

A. About $\frac{3}{8}$, or $\frac{7}{16}$, or somewhere along in there.

Q. What is the relative thickness of the top as compared to the bottom, the top third as compared to the bottom third, on the sides of the vessel?

A. The ends of the vessel would come out practically the same.

Q. How would it be ten feet abaft of the stem?

A. Practically the same thickness; that is, so far as the layman is concerned, the lay mind would not be able to distinguish between the thickness of it particularly.

Q. I am not asking you about it as a layman; I want to know what you think about it as an expert, about the thickness of the material of that vessel?

A. The two thick parts of the material would be at the upper member and at the lower member; the part of the lower member is thickened up on account of the pounding of the sea; the upper part is thickened up to strengthen the girder of the ship as a whole. The difference in thickness between the upper plating and the middle plating and the lower plating is a difference of only $2\frac{1}{2}$ pounds, probably,

(Testimony of David W. Dickie.)

or 5 pounds, per square foot, a quarter-inch plate weighing ten pounds.

Q. A quarter-inch plate weighing ten pounds to the square foot? A. Yes, sir.

Q. What is the difference between the width of the "Beaver" ten feet abaft the stem on the shelter deck over the width on the main deck?

A. Ten feet abaft of the outside of the [426] stem, the upper deck, which I presume is what you mean by the shelter deck, is about 3 feet 3 inches wider than the main deck.

Q. That is, wider from side to side?

A. Yes, sir.

Q. What is the scale on this drawing?

A. Half inch to the foot.

Q. And how much wider is the shelter deck than the tank-top? I am referring now, from the outside of the ship, the skin of the ship, in both cases.

A. The upper deck is about 5 feet 3 inches wider at the upper or shelter deck across the entire ship than it is at the peak tank-top at the point of damage, which is frame 4.

Q. If the "Beaver" were going at the rate of ten miles an hour, what speed would she make per second? Can you calculate that out for me?

A. Do you mean ten miles, or do you mean ten knots an hour?

Q. Nautical miles, ten knots.

A. Oh, roughly, about 17 feet per second.

Q. What other examination did you make of the "Necanicum" other than the examination reported here?

(Testimony of David W. Dickie.)

A. I examined the tiller of the "Necanicum."

Q. Had that been repaired then?

A. They were just repairing it at the time.

Q. When you say they were just repairing it, what do you mean by that?

A. It showed evidences of having been in the fire, and they were straightening it and putting it back in place.

Q. What day did you get there for that examination?

A. I don't remember exactly the date; I have it somewhere here.

Q. Will you let me see your note on that?

A. I think Mr. Campbell has it.

Q. I want the original note that you made. Have you got it here?

A. It is pasted right on there. I have not put the date down. [427] There are my original notes.

Q. Had it been straightened when you got there?

A. Yes, sir, they were just putting the finishing touches on. It came aboard there, some of the gear that went on it did not fit quite right.

Q. Where is your original note-book that you use in making these examinations? I don't want this finely finished product, I want the original note.

A. That is the original note.

Q. I am talking about your note-book that you jotted it down in.

A. I have a book. Here is the book. I tear the pages out and paste them on the face of the report.

Q. But this is not what you took out there in the field—these notes; where are the notes you took in

(Testimony of David W. Dickie.)

the field, in your examination of the vessel?

A. If they are not in this file, I have not got them.

Q. You use a book, don't you, in taking your notes in the field?

A. Yes, but I take them out of the book and put them in the file.

Mr. CAMPBELL.—Q. What is this, Mr. Dickie?

A. That is the original note. That is the sketch taken aboard the "Necanicum."

Q. He is talking about the "Necanicum."

A. Well, that is the sketch I took there, that and the other one; I took those sketches aboard the "Necanicum" the day I made that report. Now, this report refers to the "Beaver," and this refers to the "Necanicum."

Mr. DENMAN.—Q. Did you take any other notes at the time you examined the "Necanicum"?

A. Only what you see there.

Q. Didn't you have another page also in your notebook? A. Not that I remember now.

Q. Is it not your practice to record in your notebook the date [428] on which you make your examination? A. Generally speaking, yes.

Q. That does not appear here. Isn't there probably another page showing that you went over to Oakland, and that you did such and such a thing, on such and such a day; isn't that your usual method of making your note?

A. Yes, that is the way I generally do it. I just tear the page out and put it in the file, but I have not got it.

Q. You did take such a note, didn't you?

(Testimony of David W. Dickie.)

A. Apparently, I did.

Q. Where is the "Beaver" examination?

A. That is this one.

Q. But where have you put in your note-book that on such and such a day you did such and such?

A. Those are my notes on the "Beaver" matter. This was made on a drawing-board.

Q. You went out on a Sunday with Captain Pillsbury, didn't you?

A. No, I didn't go with Captain Pillsbury.

Q. You never were there with Captain Pillsbury?

A. Captain Pillsbury was out there. I went out with Moore & Scott's man. I met Captain Pillsbury and Mr. Campbell and—

Q. You made a second observation of the "Beaver" after that, did you not?

A. Only that day. I took all those photographs and did this work on this drawing on that Sunday, and one day previous to that—in the rain—at the wharf. I examined the "Beaver" at the Union Iron Works, I watched the work as it went along, but I did not take any notes. Here is the thickness of the plating: 18.4 pounds for the lower bilge plating; and the side plating, 17.6 pounds per square foot; the flat keel 25.4 pounds per square foot.

Q. In this photograph marked "A" in "Exhibit 4," I notice that the rake of the bow is considerably aft, and that the line of the fence, or the shed, or whatever this may be, is up-tilted. A. Yes, sir.

Q. That is due, is it not, to a slight turn in the camera at the [429] time the photograph was taken?

(Testimony of David W. Dickie.)

A. No; that is due to the rounding-in of the dock. The dock rounds in and comes into a point forward of this. That is also due to the draft of the ship. The draft of the ship was 9 feet six forward, and 16 feet nothing aft.

Q. I notice in this drawing you have made of it here, you made the bow rake forward instead of raking aft. A. Well, that is correct.

Q. So, then, the photograph that appears to make the bow rake aft—

A. This is drawn on an even keel, whereas the ship was down at the stern.

Q. If she was on an even keel, then, the photograph would show it raking forward? A. Yes, sir.

Q. So then on that day would you say she probably was raked a little forward?

A. Probably she was.

Q. I have drawn here a line from "Z" down, and ask you whether or not that is approximately the vertical line from "Z" to the line of the water as it would be on an even keel.

A. It is approximately correct. It is a little bit too far forward up at the top. If you had drawn your lines parallel to the line of rivets here, you would have something to go by.

Q. So, the line of rivets are about perpendicular?

A. They are about square to the keel—perpendicular to the keel.

Q. They are perpendicular to the keel?

A. Yes, sir. The frames on my blue-print as shown by the dotted line running vertically across the

(Testimony of David W. Dickie.)

drawing are drawn about two inches away from the line of rivets as shown on the photograph.

Q. What examination did you make for injuries on the "Necanicum's" bow? Did you make any?

A. The only examination I could make was to take a note of what had been done at the time. When [430] I got there, it was raining, and there was a cover over the top, so I could not take any photographs. The broken and crushed part of the stem was all cleared away, and the fastening which originally had come through the stem and had been clinched on the outside, was bent over to port, and they were cutting the fastening off. There were two holes in the planking in the hawse pipe where the fluke of the "Necanicum's" anchor had stuck in and injured the planking.

Q. That is on the port side? A. Yes, sir.

Q. How far abaft of the nose?

A. Just about at the hawse-pipe.

Q. How far is that?

A. I don't know the exact measurements, it must be six or eight feet.

Q. Was there any injury to the hawse-pipe on the starboard side? A. Not that I remember.

Q. Any scratches on the starboard side of the "Necanicum"?

A. Comparatively few, just the paint scratched.

Q. Did you see any scratches on the paint at all?

A. No important scratches that I remember.

Q. Well, strike out important. Did you see any? you were looking for damage there, were you not?

(Testimony of David W. Dickie.)

A. Yes, sir, I was, but I don't remember any important scratches.

Q. I will strike out the word "important." Do you remember any?

A. Well, I won't even reply that I remember any.

Q. And you were looking for them, were you not?

A. Yes, sir.

Q. Don't you think you could find for me the notes you made that day?

A. I don't see them in my file, and that is the only record I have.

Q. Of course, you would make notes as to what you found on each side of the bow, would you not?

A. Yes, sir.

Q. So that there probably was another sheet, was there not? [431]

A. I think probably there was, yes, sir.

Q. What is the angle between the stem of the "Necanicum" at its outer point, its forward point, and the fluke of the anchor on the port side, the forward port fluke, the port side fluke, as the anchor is drawn into the hawse-pipe?

A. I don't understand your question.

Q. Take the forward portion of the "Necanicum's" bow, as shown in Claimant's Exhibit "C," and the forward portion of the port side of the fluke of the anchor, on the port side, what is the angle between that, as compared to the center line of the "Necanicum"?

A. You mean to put the anchor in its position and then draw a line from there to there, to draw a line

(Testimony of David W. Dickie.)

from the frame of the anchor to the corner of the stem?

Q. Yes? A. About eight inches to the foot.

Q. What would you make the angle?

A. About eight inches in twelve. If you laid off twelve inches here and then measured up eight inches there, that would represent about the angle.

Q. That would be an angle of about 30 degrees?

A. Well, somewhere along in there.

Q. You examined it, did you not, at that time?

A. The anchor was not there in place at the time.

Q. Did you examine the port anchor at that time?

A. Both anchors were down.

Mr. DENMAN.—I think that is all, Mr. Dickie.

Redirect Examination.

Mr. CAMPBELL.—Q. There is a question that I overlooked on the direct examination. What, if anything, would the fact that the oil tanks of the “Necanicum” were set forward indicate as to whether or not she had headway at the time of the impact?

A. The oil tanks on the “Necanicum” being set forward, would [432] indicate that the vessel had been suddenly stopped by coming in contact with something, and that the momentum of the whole structure had driven the tanks forward.

Q. Would it or would it not indicate actual headway on the part of the “Necanicum” at the time of impact?

A. It would indicate headway on the part of the “Necanicum” at the time of the impact.

Q. What would have been the nature of the dam-

(Testimony of David W. Dickie.)

age, in your judgment, if the "Necanicum" had not had headway at the time of the collision, and that the "Beaver" did, and the touching of the two vessels was about at the angle which you have shown?

A. If the "Necanicum" had not headway and the "Beaver" did have headway, I think that the vessels would have had a tendency to sheer off; I think that the fine angle of the "Beaver," and coming against the bow of the "Necanicum," I think the "Beaver" would have had a tendency to sheer off more; and the "Necanicum" would have a tendency to sheer off to starboard, both vessels sheering off to starboard rather than the "Necanicum" cutting in the way she did into the "Beaver."

Q. If the angle which the "Necanicum" bore to the "Beaver" was more acute, so she was more nearly on a parallel line with the "Beaver," and the "Necanicum" was dead in the water and the "Beaver" struck her stem, would or would not the tendency to shunt the "Necanicum" off, or both vessels being shunted off, be increased?

A. It would be increased; yes, sir.

Q. What was the size of the tiller on the "Necanicum"?

A. It is given there on those little notes.

Q. Is this the note you refer to?

A. That is one of them, yes. The size of the tiller was 3 inches by 3 inches.

Q. What is Lloyds' requirement for a tiller on a vessel of that [433] size?

A. Lloyds' requirement for a tiller on a vessel in

(Testimony of David W. Dickie.)

that condition would be $7\frac{1}{4}$ inches by $3\frac{3}{4}$ inches high.

Q. How much is the natural rake of the stem of the "Beaver" forward?

A. From the 19-foot draft line up to the upper deck, the stem rakes forward about 12 inches.

Mr. CAMPBELL.—That is all.

Mr. DENMAN.—That is all. I may call you further, Mr. Dickie, when there is further evidence in the case. I may ask for further cross-examination when there is other evidence in the case; but at the present time I am through with you.

Mr. CAMPBELL.—Do you want his attendance upon the Court?

Mr. DENMAN.—No.

Q. You will be in town for the next two days, will you not, Mr. Dickie? A. Yes.

Mr. DENMAN.—Then I will simply 'phone to you and bring you out here if I want you.

Mr. CAMPBELL.—May I ask the Court's permission to introduce this blue-print in evidence?

The COURT.—Yes.

(The document was here marked "Libelant's Exhibit 9.")

(A recess was here taken until two o'clock P. M.)

[434]

AFTERNOON SESSION.

Mr. DENMAN.—I would like to put in evidence as I may this note.

Mr. CAMPBELL.—Just take the reports off, Mr. Denman, and not put the photographs in; the photographs are the same as those in evidence, and I would like to keep them.

Mr. DENMAN.—This is the report of Mr. Dickie on the damages to the “Beaver” and to the “Necanicum.” I will offer this in evidence.

(The document was marked Claimant’s Exhibit “H.”)

Testimony of Frank H. Evers, for Libelant.

FRANK H. EVERS, called for the libelant, sworn.

Mr. CAMPBELL.—Q. How old are you, Mr. Evers? A. 47.

Q. What is your business?

A. Marine surveyor and consulting engineer.

Q. What if any society are you surveyor for?

A. Surveyor and agent for the American Bureau of Shipping, and engineer surveyor for the British corporation.

Q. How do the purposes of the British corporation correspond to those of Lloyds’ register of British and foreign shipping?

A. Similar, just identically the same.

Q. What is the American Bureau of Shipping, to which you refer?

A. Practically the same thing, for the classification of vessels, for insurance purposes.

Q. Are there any other than American vessels classed in the American Bureau?

A. Yes, all nationalities.

Q. How long have you been surveyor and agent for those two societies?

A. Well, I was engineer surveyor for the bureau, [435] I should say, for a matter of 15 years; I have only been an agent of it for a matter of six years. But for the British corporation I have been engineer

(Testimony of Frank H. Evers.)

surveyor for it for over 14 years, I should think.

Q. What has been your training as a surveyor? Just tell the Court what your training has been since you started in the shipping business.

A. As a boy?

Q. Yes, a brief statement so that the Court may gather some idea as to what your experience has been.

A. Well, after finishing my school training at Royal Grammar School, Newcastle-on-Tyne, England, I went into a shop at the age of 15, or about that, I should say, to serve my time as a machinist, to fit myself to be an engineer.

Q. What shop was that?

A. Armstrong-Mitchell's. During the five years that I was there, that I was serving my time, I went about four or five nights a week to evening school, to learn mechanical drawing, mathematics and mechanics, on all of which I passed, graduated. After I finished my time, I went to sea till I obtained my chief-engineer's papers as chief-engineer of English vessels. I ran that way as chief-engineer of English vessels for a matter of not quite two years, something like that. Then I was wrecked in a vessel down in Florida, which we raised and brought up here to America, and she changed her flag and came under this flag, and I sailed on her under the American flag as chief-engineer up to the time I came to be a surveyor here.

Q. What ship was that?

A. The last ship I was in?

(Testimony of Frank H. Evers.)

Q. No, what was the ship that was wrecked?

A. Her name is now the "Washtinaw." Her name then was the "Oxford." I have been superintending engineer for a large number of vessels here, such as the Saginaw Steamship Company, the Michigan Steamship Company, [436] the Progressive Steamship Company, and the Union Oil Company, for a number of years. At present I am with several companies yet, and own an interest in a number of vessels.

Q. Did you make an examination of the steamship "Beaver" after her reported collision with the steam schooner "Necanicum"?

A. Yes; for the American Bureau of Shipping.

Q. Where did you survey the "Beaver's" damage?

A. The "Beaver's" damage was surveyed at Hunters Point drydock.

Q. Will you describe to the Court as well as you can from your recollection the damage which you found the "Beaver" to have suffered?

A. I wrote a report on it at the time which is on record. I should say without referring to my notes that it would be on the port side, sheer-strake, one plate, and then for eight strakes down the plates were fractured, on the shell plating, disturbing the frames from No. 1 to 7, I think, breaking the beams on the upper deck, the main and the Orlop deck—not breaking them all, but disturbing some of them only. Carrying in these three decks with it, and pushing

(Testimony of Frank H. Evers.)

the stem of the "Beaver" around, I should say, 18 inches out of plumb.

Q. Which way did it come or go?

A. It came toward the collision. The hawser pipe was broken, that is to say, where it came through the little flask bulkhead; the anchor cable was shot off, the links were bent in and had to be condemned. On the starboard side, the vessel was sagged outwards, and there was about three plates broken and I should say about eight or nine had to be taken out and straightened, together with the frames, stringers, angles and everything in the way it was.

Q. I hand you "Libelant's Exhibit 4," made up of a series of photographs, and ask you to examine the same and advise us as to whether or not these photographs show the damage which you have been describing. [437]

A. These are all photographs of the damage, but it does not show it all; you cannot see the interior of it, of course.

Mr. DENMAN.—Mr. Campbell, please do not use the exhibit with the markings of Mr. Dickie on it, the suggestive markings; I would rather have the witness give his own theory as to how they struck.

Mr. CAMPBELL.—I will use my own copy if you do not mind.

Mr. DENMAN.—I noticed in relief you had other copies.

Mr. CAMPBELL.—You will admit that this is a copy of "Libelants Exhibit 9"?

(Testimony of Frank H. Evers.)

Mr. DENMAN.—I will admit it is a copy of the blue-print, but not of the exhibits.

Mr. CAMPBELL.—You will admit that this is a copy of the same blue-print that was used for “Exhibit 9”?

Mr. DENMAN.—Yes.

Mr. CAMPBELL.—I will ask you to look at this. This has some marks of mine on it. Is that all right?

Mr. DENMAN.—No. I would like to have his own theory as to what happened to the side, not have somebody else’s scheme all worked out.

Q. Mr. Evers, did the original report have any sketches in it?

A. No; no sketches in our report whatever.

Q. Have you got any sketches at your office?

A. No, I have not.

Mr. CAMPBELL.—Q. Did you make any sketches?

A. No, I had no occasion to make sketches.

Mr. CAMPBELL.—Does this meet with your satisfaction, Mr. Denman?

Mr. DENMAN.—Have you got a clean copy of it?

Mr. CAMPBELL.—That is the only one I have. If you can erase it any better than I have, I would be glad to have you [438] do it.

Mr. DENMAN.—Examine him and have him give a full description of what he saw before he testifies from that, because it is most suggestive to hand one somebody else’s survey and ask him if it is right.

Mr. CAMPBELL.—You are anticipating the

(Testimony of Frank H. Evers.)

question perhaps I was going to propound to him.

Q. Will you describe a little more fully to the Court, to meet Mr. Denman's objection, the character of the disturbance of the plating, and of the framing of the vessel?

A. Well, I should say that the plating and the frames in the wake of 3, 4, and 5 frames, as it would be numbered from forward, were pushed in about 3 feet.

Q. On which deck?

A. On the upper deck. Then came a wave in the ship's side again, a little ways back, and then the ship's rail started to go up straight again. The fracture was very much more, very much larger at the overhang, where the ship flares out than it was at the bottom, that is to say, the keel of the vessel went in this shape.

Q. A flaring bow?

A. A flaring bow. It flares out.

Q. What do you mean by the fracture was a great deal more?

A. Where she had been hit in this collision, the fracture was more open at the top, and gradually went in towards the bottom, just as the ship came in contact with it.

Q. Can you point that out to the Court in the photographs here? Just describe it to the Court.

A. We will take this. What exhibit is this?

Q. Exhibit "D."

A. This is Exhibit "D"—to show what I mean—

(Testimony of Frank H. Evers.)

Q. (Intg.) That is photograph "D" on "Exhibit 4."

A. To show what we mean by the flare—this is the flare here. [439] Now, the "Necanicum" coming up as I suppose like—or whatever the vessel was that hit her—came up like so; it would hit here first and go further in here than it would down here, so that the slightest damage would be down below; and it would indicate just as she hit her, as it shows in here; it tapers away here, it is wider out here,—it is wider up here.

The COURT.—Q. Wider and deeper?

A. Wider and deeper, yes. These plates down here were not crumpled, you see, like these plates are at this side, and as they were here; that shows the part in here where her anchor went in, that is to say, the "Necanicum's" anchor.

Mr. CAMPBELL.—Q. On the lower part of photograph "A" is there any indentation to show where the stem of the "Necanicum" struck?

A. Sure. It came just about to here and then it dented the rest in; it came to about, I should say, the 6 or 7 foot mark—the 5 or 6 foot mark; then she pushed the rest in—then as she rolled over it did the worst of it.

Q. That is the 15 or 16 foot mark?

A. Yes, that is it. When she rolled over she did the rest of it; below this water-line, you can see another dent, and on the opposite side of the vessel you can see where it is bulged out and the keel plate is cracked, you see, just as this is shown here, taken

(Testimony of Frank H. Evers.)

over and twisted around here.

Q. On "Exhibit J"?

A. Over this way—the elongation of the plates on the other side, where the contour was taken up, and therefore this stem had to follow it around in the same way. For instance—

The COURT.—I get your idea.

Mr. CAMPBELL.—Q. I show you a duplicate copy of the blue-print which was used for "Libelant's Exhibit 9" produced by Mr. Dickie [440] this morning, and ask you to examine the contour lines of the upper and main decks and the peak-tank top, and tell me whether or not the distortion to those contour lines shown on the port side—that is whether or not the distortion there shown is as you remember it to have been when you examined the "Beaver" while she was in the Hunters Point dry-dock? A. What scale is this to?

Q. One-half inch.

A. An inch would be two feet apart.

Mr. DENMAN.—Q. What are these, the frames?

A. Yes, these are the frames. I should think that that is about how I saw it. She was in here about 3 feet.

Mr. CAMPBELL.—Q. Opposite what frame?

A. Just between 4 and 5.

Q. Will you indicate to us on these contour lines the point of impact between the two vessels as you believe them to be, from your examination?

A. About at right angles to this contour line here opposite 4.

(Testimony of Frank H. Evers.)

Q. Will you mark it with the capital letter "A"?

A. Yes. Then about at an angle—

Q. (Intg.) What angle would you say that was?

A. 45 to 50, somewhere thereabouts, from here.

Q. Now, assuming what I hand you, "Libelant's Exhibit 8," is the form of the bow of the "Necanicum" drawn to scale, I ask you to take and place that bow against what was the original contour line of the upper deck, so as to show what you believe to have been the angle of impact between the two vessels? A. Is this the same scale?

Q. No, I think not.

The COURT.—I thought he said it was.

Mr. CAMPBELL.—Did he?

Mr. DENMAN.—That was my understanding of it. [441]

Mr. CAMPBELL.—I thought it was a larger scale.

A. About like that.

Q. Just draw on the blue-print the outline of the bow of the "Necanicum"—draw a line right around this end. A. That is as near as I would think.

Q. Write the word "Necanicum." A. Yes.

Q. Now, can you point out on these contour deck lines the points on the opposite side where the plating bulged or broke or knuckled, whatever you term it, and mark it with the letter "B"?

A. Yes; that is a little bit forward of 4.

Q. Where with respect to frame 4 or beam 4 as it was in place before the collision, do you think that the impact came; that is to say, did it come opposite,

(Testimony of Frank H. Evers.)

forward or aft of beam 4?

A. It came about one 4, frame 4—not beam 4, frame 4. Frame 4 is here.

Q. Did you see the “Necanicum’s” bow after the collision? A. No.

Q. I hand you two photographs which are said to represent the condition of her bow as she came into this port. A. This is the first I have seen of it.

Q. I ask you from your knowledge of the damage to the “Beaver” and from what you saw of the damage to the “Necanicum’s” bow, whether or not in your judgment the “Necanicum” was going astern at the time the two vessels came together.

A. When they collided?

Q. Yes.

A. No. The “Necanicum” was not going astern.

Q. I will ask you whether or not in your judgment, based on the same facts, the “Necanicum” was at a standstill, or dead in the water at the moment of the impact. A. No.

Q. What would have been the action of the two vessels if at the time of the collision the “Beaver” was going ahead and the N. [442] was dead in the water, but that they actually touched at the angle which you have fixed?

A. I think you would have rubbed the “Necanicum” out of the way and broke her stem off here, broken the stem right off.

Q. Whose stem? A. The “Necanicum’s” stem.

Q. Do you think that the “Necanicum’s” stem would have been crushed and splintered as shown in

(Testimony of Frank H. Evers.)

these photographs, Claimant's Exhibit "C" and "D," or would the breakage of the "Necanicum's" stem under those circumstances have been of a different character?

A. It would have been clean; it would have been a clean break.

Q. How do you account for the waves in the contour lines of the deck forward of the point of impact which you have fixed?

A. Well, some of it is taken up with the elongation of the plates and straightening of them from their original contour.

Q. What do you mean by the elongation of the plates?

A. You see that the bow is coming to meet, coming around toward the stem. The other part of it has been done when the "Necanicum" slewed around like that to get rid of her.

Q. That is when the "Necanicum's" head was turned toward the "Beaver's" bow to swing out?

A. Yes; because you will notice in the big photograph you showed me there now that she tears away a good deal of her upper structure in that place; here it is shown.

Q. Just what do you refer to now?

A. I refer to this, you see; she just took and squeezed that right out of there as she was trying to free herself, and her anchors and everything brought out here.

Q. That is below and between the points marked "X" and "Z" on the photograph "Exhibit 4"?

(Testimony of Frank H. Evers.)

A. If I remember rightly, there was a [443] mark on the other side, here, where it showed her starboard anchor, just touched here.

Q. Whose starboard anchor?

A. The "Necanicum's" starboard anchor had touched this vessel, and on the port side it was very distinct; it was traceable four inches around, distributed on that side, on the starboard side.

Q. In your judgment, Mr. Evers, could the damage that was inflicted upon the "Beaver" have been done to her if at the moment of impact the "Necanicum" was dead in the water and the "Beaver" going ahead and the "Necanicum" slipped along the side of the "Beaver"?

A. No. It would have been a damage all the way along on the flare of the "Beaver."

Q. What does the condition of the "Necanicum's" stem indicate to you, if anything, as to the action upon it? A. A crush.

Q. What sort of a crushing movement?

A. Well, a grinding, crushing movement.

Q. Which way was that grinding, crushing movement? Which way did it push the woodwork?

A. Well, it would have a tendency to shove it right in toward the vessel, and it would have a tendency to spread it.

Mr. DENMAN.—Q. Both ways?

A. It would sponge it out both ways.

Mr. CAMPBELL.—Q. When would come the greatest force of impact between two vessels in collision as these were, at the moment when they first

(Testimony of Frank H. Evers.)

touched, or at a subsequent moment?

A. The moment they touched, the identical moment they hit.

Q. Why?

A. Because they would be both coming ahead, and the vessel would bring right up with one shot, the velocity would be all there at that time.

Q. In your judgment, could the damage that was inflicted upon [444] the "Beaver" have been done if she first struck opposite frame 3 and then slipped along to frame 4, and then toward 5?

A. No, I think she struck right in about 4.

Q. If she had struck at frame 3, would you or would you not have expected the bulge on the star-board side to have been opposite frame 4?

A. The further that she cut along forward, I would have expected less of this stem to have been thrown over.

Q. Why?

A. Because look at the leverage that you have at the other end; the more leverage, the further you would have to come over and the more plates you would bend in that elongation.

Q. From the character of the damage you found inflicted upon the "Beaver," in what direction would you have expected the "Necanicum" to have been turned by the force of the collision?

A. I would expect it to turn—you are talking now of which way the "Necanicum" would swing?

Q. Yes. A. She would swing to port.

(Testimony of Frank H. Evers.)

Q. So as to head toward the same direction as the "Beaver"?

A. The same direction as the "Beaver."

Q. If the "Necanicum" was dead in the water at the moment of impact, which way would you expect her to be turned?

A. Being at the same angle as she was?

Q. Yes.

A. I would expect her to turn that way, and bring her right up alongside.

Q. Would you expect the same penetration?

A. No.

Q. Now, assume that instead of the impact being at the angle which you have fixed it was at a more acute angle from forward and that at that moment the "Necanicum" was dead in the water, in what way would you expect the "Necanicum's" bow to have been turned?

A. The "Necanicum's" bow to be turned? [445]

Q. Yes.

A. It would swing her off to starboard then.

Q. In an opposite direction to the bow of the "Beaver"?

A. In the opposite direction to the bow of the "Beaver."

Mr. CAMPBELL.—I offer in evidence the blue-print which Mr. Evers has just been working upon.

(The blue-print was marked "Libelant's Exhibit 10.")

Cross-examination.

Mr. DENMAN.—Q. Mr. Evers, as I understand

(Testimony of Frank H. Evers.)

your testimony, you say that the hawse-pipe was crushed back in and that the anchor mark was quite a ways above it on the side of the ship?

A. I did not say the hawse-pipe. I said the hawse-pipe on the false bulkhead, the interior one, was broken.

Q. That was broken?

A. Yes, not the one that is on the ship's side, that you see in that photograph. There is a little one, a little different structure than what the ordinary vessel has; she did not come through with one casting; she has got one on a little false bulkhead on the inside, it comes through into the fireman's fore-castle; that was the one that was broken.

Q. Now, I notice that you say that the two vessels came together at an angle of about nearly right angles, considering the stem of the "Necanicum" with reference to the round of the shelter deck on the "Beaver"; that is correct, isn't it?

A. I said that I thought the "Necanicum" came in collision with the "Beaver" at about right angles to the contour of the upper deck.

Q. That is right. Is it your idea that unless the two vessels struck at right angles at that contour, that they will always glance off? A. Off.

Q. Suppose they struck at an angle of 45 degrees at that contour and the speed was sufficient; would there be a penetration?

A. There would be a long damage; there would not be a single damage [446] where the stem of the vessel is actually shown, but you would have a little

(Testimony of Frank H. Evers.)

bit of the bluff of her bow, and you would have a scraping collision, which would extend a number of feet along the vessel.

Q. Possibly the scrape would be as much as five or six feet? A. It might be 20 or 30 feet.

Q. It depends upon your angle as you go around?

A. You said at a pretty straight angle.

Q. I said 45 degrees.

A. 45 degrees is half of 90, so you would have a very good scrape.

Q. As I understood your statement, it was about 45 degrees to a lower part of the vessel, below the flare? A. To the keel of the vessel.

Q. Suppose, now, that the angle to the curve of the upper deck is 45 degrees. A. Yes.

Q. 45 degrees, at about that angle, do you mean to say that if the speed was sufficient penetration would not be instant?

A. How was your other vessel coming?

Q. I am presuming now we have here a fixed object, a pointed object lying in the water, and the other vessel is driving herself on it.

A. Not a bluff vessel like the "Necanicum."

Q. I am speaking now about the "Necanicum's" stem, that was straight out a foot, was it not, or 18 inches?

A. No, the "Necanicum" would be 9 or 10 inches, or you would have that stem sticking out above the planking.

Q. Don't you know it is about 18 inches?

A. I don't think it will be 18.

(Testimony of Frank H. Evers.)

Q. Don't you know it is that?

A. No, I don't think it is that. I would not say it was more than 8 or 9 inches.

Q. If that 8 or 9 inches struck the side of a vessel, that would [447] penetrate, would it not?

A. No, unless you hit at right angles. I don't think you could penetrate at 45 degrees. I don't think the stem would enter at all. I think where you would get the blow, both vessels would take it on their bows.

Q. But I am presuming that the first point of contact—

A. You mean the first point of contact, with an angle of 45 degrees?

Q. I am presuming now that this is the "Beaver"—before I go on with this, let me ask you what speed did you calculate the two vessels were making at the moment of impact?

A. I have never calculated it.

Q. What did you think of it from your observation of it?

A. Well, I should say the "Beaver" was going anywhere from 4 to 5, and the "Necanicum" was doing about the same.

Q. You think the combined impact was about 10 knots?

A. I think the combined impact was about 10 knots.

Q. It could not have been done at 2 or 3, could it, what you saw there in the way of injury?

A. Both vessels 2 or 3?

(Testimony of Frank H. Evers.)

Q. No, the combined impact?

A. Well, I don't think you could do that much damage.

Q. Well, now, as a matter of fact, might it not have been a combined rate of 15 knots?

A. No, I don't think you would have that much, because I think you would have gone into that collision bulkhead.

Q. So it is somewhere between that as a maximum and your 5 or your combined 10 knots?

A. I said my idea was 10 knots, combined, or 9.

Q. Now, I am asking you this question: Suppose that the "Necanicum's" stem is in that position.

A. Yes.

Q. And strikes the "Beaver's" bow, would you in your opinion— [448] what would determine whether or not she would penetrate—the velocity, would it not? If you had velocity enough, it would penetrate, would it not, and would not glance?

A. No. It depends on how you hit it, for it to penetrate. A glancing blowing will never penetrate.

Q. Don't you know that if you have got velocity enough it will penetrate

A. Well, if you have got velocity enough behind it.

Q. Now, if we got velocity enough behind the "Beaver" coming down, it would impinge on that point of the "Necanicum," would it not?

Mr. CAMPBELL.—With the "Necanicum" dead in the water?

Mr. DENMAN.—It don't make any difference if you put the velocity in the "Beaver."

(Testimony of Frank H. Evers.)

Mr. CAMPBELL.—I ask you, does that assume that the “Necanicum” is dead in the water?

Mr. DENMAN.—There is nothing about that in the question at all.

Mr. CAMPBELL.—It is not a fair question, Mr. Denman.

Mr. DENMAN.—I have asked him that question. If you have a vessel sharp enough, which we know the “Necanicum” is not, you could penetrate here, but I think the “Necanicum’s” bow would be so bluff that it would fetch up on the bow before she would catch there, before she would catch on that stem.

Q. She would?

A. Yes. If you will fetch up your models I think you will see it.

Q. Have you a copy of your model, Mr. Campbell, of Mr. Dickie’s model?

Mr. CAMPBELL.—Yes.

A. That is plain enough. Where is the big one of the “Beaver”?

Mr. DENMAN.—We have not got anything with the curve of the “Beaver’s” bow at all.

Mr. CAMPBELL.—Yes, we have.

A. What angle do you wish that at? 45 degrees?
[449]

Mr. DENMAN.—Q. Your statement is, I believe, that looking at the drawing which I will call Claimant’s Exhibit “I,” your statement is that the “Necanicum” could not ram the “Beaver” at the angle appearing in this Claimant’s Exhibit “I” because the bluff of the “Necanicum’s” bow would—

(Testimony of Frank H. Evers.)

A. (Intg.) Take the force of the blow.

Q. And prevent the penetration of the stem?

A. Yes.

Q. Into the "Beaver's" side?

A. Yes. In this way.

Q. Now, I ask you to place the "Necanicum's" bow in the starboard side of the "Beaver" at an angle between the center line of 30 degrees.

Mr. CAMPBELL.—That is between the keel line?

Mr. DENMAN.—The center lines of the vessel.

A. You want 30 degrees from here?

Q. Yes, that is parallel, isn't it?

A. No. I will give you 30 in just a moment. That is about it.

Q. Just draw in that figure, 30 degrees.

A. All right.

Q. Now, I will ask you whether there is anything in the bluff of the bow of the "Necanicum" that would in any way interfere with the "Necanicum's" nose cutting into the "Beaver's" side?

A. There certainly is; she hits right on the corner, and that comes right up on this place.

Q. I am asking you whether there is anything to interfere with the penetration of the "Necanicum's" nose into the "Beaver's" side in the bluff of the bow of the "Necanicum"?

A. Yes, there is. It would catch on the corner and come up against here.

Q. I am asking you whether there is anything there to interfere with its going in?

A. It would not go in.

(Testimony of Frank H. Evers.)

Q. I am asking you whether there is anything on the bluff of the bow of the "Necanicum" to interfere with her going into the [450] "Beaver's" side?

A. I can't see where she would go in. Certainly there is, because the "Necanicum" would glance right off and just come up on the bow here, and the bluff of her bow be against the bow of the "Beaver."

Q. Is there anything there to interfere, if you had velocity enough to penetrate her. Here that would be an angle of how much to the side?

A. 30 degrees.

Q. I am asking you now about the angle of the "Necanicum's" bow to the side of the "Beaver"?

A. The center line of the "Necanicum" is 30 degrees to the center line of the "Beaver."

Q. I am asking you of the angle of the "Necanicum's" bow, from the center line to the side of the "Beaver."

Mr. CAMPBELL.—You are asking for the degree of angle, as I understand it?

Mr. DENMAN.—Yes.

A. That is about 75 or 80 degrees.

Q. All right. Now, if the "Necanicum" struck the side of the "Beaver" at an angle of 70 degrees, would she penetrate her?

A. I think she would, 75 degrees— I think she would penetrate a little.

Q. So that if she were at an angle to the center line of 30 degrees she would penetrate her?

A. Let us see what it is, now.

Q. Where did you get the angle to the side?

(Testimony of Frank H. Evers.)

A. She is more than 40 now, she is more than 50.

Q. You drew her in at 30?

A. I drew her in at what you asked me.

Q. I asked you to draw it in at 30 degrees, to the center line.

A. What do you want. You asked for 30 degrees to the center line.

Q. You drew it in 30 degrees to the center line, when I asked you.

A. I did not calculate that to the center line.

Q. I don't know how you drew it, Mr. Evers.

A. This would be [451] different, you see.

Q. Mr. Evers, I am now tracing the outline of the upper deck of the "Beaver" as shown in your Exhibit "No. 9," and I am asking you if I am not placing—before I do that, let me ask you what angle, in your opinion, would the "Necanicum" have to strike the "Beaver" in order to penetrate the upper deck?

A. The upper deck, alone?

Q. Yes. A. Well, I should say about 75.

Q. About 75? A. Yes.

Q. In other words—

A. (Intg.) Which way are you taking it now? Are you taking it from the contour of the deck, or are you taking it from the center line?

Q. The contour of the deck.

A. I should say about 75 degrees.

Q. Why do you say it would not cut in at 60 degrees?

A. Because I think it would be too much of a

(Testimony of Frank H. Evers.)

glancing blow; I think she would squeeze along and have long damage.

Q. Have you ever made any experiments?

A. I have seen lots of damage of that sort.

Q. Have you ever seen any where you actually saw the angle at which the vessels came together?

A. I have seen a number of vessels come together—I have seen the damage when they came together; I have never stood on the deck and watched them come together.

Q. Would you be able to give any reason why, if they struck at an angle of 45 degrees and with momentum enough behind, the bow of the “Necanicum” would not penetrate into the “Beaver’s” side?

A. At an angle of 45 degrees it would not penetrate in that.

Q. I am not talking about that. I am talking about penetrating the side.

A. Why would it not penetrate at 45 degrees?

Q. Yes.

A. If both vessels were going at a very high rate of speed, I guess she would do some damage like that, at a very [452] high rate of speed; but she would never do all the damage you have done in here with any 45 degrees.

Q. Now, I ask you, presuming that you struck this vessel at an angle of 45 degrees—see if this is 45 degrees, will you, Mr. Evers?

A. 45 degrees from this?

Q. Yes.

A. I am taking it from the contour; is that right?

(Testimony of Frank H. Evers.)

Q. Yes, from the contour. Is that about it?

A. That is about it.

Q. That is not 45 degrees from the contour?

A. That is 45 degrees from the coutour, half an angle.

Q. Is that about it?

A. I will divide this up here.

Q. Is that it? A. Yes.

Q. Now, I ask you whether if the vessels were moving at a sufficient velocity, the "Necanicum" would not engage and enter the "Beaver's" side at that angle?

A. No, I think she would take out the whole of the overhang of the "Beaver," and just touch him going this way; she would not penetrate any further than the sheer-strake; it never would go down further than one or two strakes at the most.

Q. What angle would these two vessels be at with regard to their center line, as I have drawn it there. Just deduct one from the other, Mr. Evers.

A. I don't think it is over 15 or 20 degrees.

Q. 15 to 20 degrees.

Mr. CAMPBELL.—Prolong the center line of the "Necanicum" down to where it meets the center line of the "Beaver."

A. Yes; between 15 and 20 degrees.

Mr. DENMAN.—Q. Now, as I understand it, somewhere between this angle and striking at right angles to the deck line in that position, somewhere between those two in your opinion, there would be a penetration instead of a glancing blow?

(Testimony of Frank H. Evers.)

A. Yes. [453]

Q. Somewhere between those two?

A. Yes, you could make a penetration a little between those.

Q. You cannot say with any scientific accuracy which place it is, can you?

A. No, I don't think there is any scientific rule for it.

Q. Now, at one angle between those two angles you would get a partial scraping and penetration; at another, a lesser, a more of an acute angle you would get a greater scraping and less penetration?

A. Yes.

Q. Then you would come around, as you came around, from one to the other?

A. Yes. The scraping would be longer as your angle got more acute.

Q. So that you would have, first, as the angle got acute, more acute, you would have more scraping and less angle of penetration? A. Yes.

Q. Now, of course, you don't know at what angle those two vessels met, do you?

A. Well, I formed an idea at the time, and still I am of that same opinion.

Q. But it might be possibly anywhere between a point on each side of that, might it not?

Mr. CAMPBELL.—Compass point, you mean?

Mr. DENMAN.—Yes.

A. I formed that opinion at the time, and I still stay with it.

(Testimony of Frank H. Evers.)

Q. I know, but I say it may be a point either way, may it not?

A. Probably might have been a slight degree one way or another.

Q. And as it is one way or the other, you would have more or less scraping on the side before penetration came, would you not?

A. No, only when it got more acute; when it got more acute, you would have more damage than you would have, that is, for length, but you would not have the damage so low down; but the straighter [454] it is, the further down the damage would go towards the keel. She would catch first of all the overhang, and she would keep right on penetrating and penetrating until she got in to the keel, down to the eighth plate; that makes nine plates in all.

Q. Take this large photograph "A," of "Exhibit 4" and tell me the lowest point at which the vessels came together in the direct blow.

A. I should say at about almost the 15-foot mark, till they rolled over, and then when the "Beaver" rolled over she cut it still lower, a good deal lower.

Q. Now, I am asking you—

Mr. CAMPBELL.—Q. (Intg.) Which way did she roll, to starboard?

A. She rolled to the starboard; she was hit on the starboard side.

Mr. DENMAN.—Q. Then you think there was a gradual pushing effect on the lower line of the "Beaver" instead of direct cutting in?

(Testimony of Frank H. Evers.)

A. I think she cut her lower in, as all vessels will when they come in collision, they roll back to the opposite side of the blow; she rolled back and gave more body to it; and she was cutting it up as she went down.

Q. Was she going ahead while she was doing all that?

A. She was not going ahead very fast, or she would not have torn the vessel out in that way.

Q. Was she going ahead at all?

A. I think she was going anywhere from 4 to $4\frac{1}{2}$ knots.

Q. What do you gauge that on?

A. I gauge that on the way the damage was done to her, by the extent of it.

Q. Why do you say 4 instead of 8? Did you make any measurements? A. Because twice 8 is 16.

Q. Did you make any measurements?

A. I made measurements of the distance of the damage. I did all the repairs that were [455] done; I was superintendent.

Q. Did you make any calculation based on measurements?

A. No, I did not make any calculation.

Mr. CAMPBELL.—Q. To determine what?

Mr. DENMAN.—The velocity of the “Beaver”?

A. No, I did not make any, but I took into consideration the actual penetration that was made over the side of the vessel, and what she cut through, and the deck she destroyed, and the tie plates and the

(Testimony of Frank H. Evers.)

stringer plates, and saw it was just such a narrow margin.

Q. Will you please mark on here the lowest point at which you think this square impact came?

A. Where she actually hit her before she rolled?

Q. Yes.

A. From here to here. You see, she struck here first, and then went on in; she struck here up in the upper deck first.

Q. Now, on this Exhibit "A," photograph, of "Exhibit 4," it is your opinion that she struck first at the point indicated by the arrow?

A. She struck up on the flare of the bow at first.

Q. I am speaking of the lower end.

Q. That is the first place she struck on the lower end?

A. The blow was all one, because she was rolling, she started to roll the time she hit.

Q. She would have to have something to turn her?

A. Just the minute she hit her, she started to roll over, and that is how the damage comes to be least here.

Q. Then the furthest point forward at which she struck is the point "B" and the lower end of the damage there—is that about right? The point furthest forward low down at which the "Necanicum" struck the "Beaver" is the point "B": Is that right? [456]

A. She struck her all the way in. She came right in—

Q. Don't try to argue it. Just answer the ques-

(Testimony of Frank H. Evers.)

tion directly. The point lowest down and furthest forward at which the stem of the "Necanicum" struck the "Beaver" is the point "B", isn't it?

The COURT.—That is combining both those elements.

Mr. DENMAN.—Lowest down and furthest forward.

A. I do not understand the question.

Q. The point lowest down on the side of the "Beaver" and furthest forward, combining the two, lowest down and furthest forward.

Mr. CAMPBELL.—Before the "Beaver" started to roll?

Mr. DENMAN.—I am not talking about any time at all, the first point coming aft—

A. (Intg.) She cut her right down to this, right down to the bottom.

Q. That is further aft, isn't it?

A. No, she cut her right down to the bottom, here; you see this mark is going on down.

Q. Opposite the point 5? A. Yes.

Q. And coming back from the point 5, the first point at which there was an impact is at the point "B"?

A. The first place that the vessel hit her?

Q. That there is an indentation showing a blow.

A. That is where she hit her, yes; that is where she hit the vessel.

Q. Now, I want you to find me the line of the rivets, the vertical line of the rivets on there, if you will.

(Testimony of Frank H. Evers.)

A. Here is lots of them here. On what frame do you want them?

Q. Any one of them there; they are all perpendicular to the keel, aren't they?

A. They run off, and there are perpendicular rivets. Here is frame 1, 2, 3, and 4, and then you can't see it for the crack, and then 5 and 6.

Q. Take 6. A. And there is 7.

Q. Take 6 and draw me a vertical line from the rivets. [457]

A. It is hard to get at in the light here. As near as my eyesight can see, I should take that to be No. 5.

Mr. CAMPBELL.—Go to the window, Mr. Evers, and see if you can get a better light.

A. I think that is No. 6 there.

Mr. DENMAN.—Q. Will you draw a line through "B" parallel to the line of rivets? If you have got a pair of calipers here we can lay it off.

A. They are bound to be all placed like that.

Q. The arrow points to that point.

A. That is not a row of rivets where you have got that.

Q. On the forward end of it? Just follow my advice, Mr. Evers. Draw me a line through "B" parallel to the rivets. A. All right.

Q. That is about right, is it?

A. That is about parallel with the rivets.

Q. Now, what is the hole made at "T"?

A. That is where the anchor of the "Necanicum" was.

(Testimony of Frank H. Evers.)

Q. The anchor of the "Necanicum" sticks out a great deal further than the bluff of the bow, doesn't it?

A. Let me see. To the best of my recollection, I think that is where the anchor was. I could not swear to that, but I remember the imprints.

Q. What else could have made that on the side of the "Necanicum"?

A. Well, as the "Necanicum" was getting away from her, she might have done it with her stem iron, or with her stem.

Q. Her stem? A. Yes.

Q. Do you think her stem was that low down on the side of the vessel?

A. No, but it is all the way around there.

Q. Does that look like the blow of a stem iron?

A. Mr. Denman, her anchor chains were damaged at that time, whether they were taken up on deck or leading out through there, I could not tell [458] you—the "Beaver" anchor chains.

Q. So that it might have been the driving of the "Beaver" anchor chain in there that did that?

A. It might have been that, but I could not say.

Q. How were these anchor chains hurt?

A. Crushed, but I don't know whether they were out on deck, whether the anchor was taken in and the chain taken with it, and this all closed up, which they do mostly at sea, or whether it was lying outside of it, I could not tell you that, I don't know.

Q. The point marked "X" is almost vertically

(Testimony of Frank H. Evers.)

over the point where the anchor drove in, is it not? Of course, you will notice the bow is tipped back. It is vertically over it, practically? A. Yes.

Q. The line of the rivets is vertical to the line of the keel, is it not?

A. There, yes. You can call it that way. They are not always exactly, though.

Q. Take it right up the whole length of the ship, that is what they aim to do?

A. That is what they aim to do, yes.

Q. As I understand it, you say that a part of your theory is that the "Necanicum" swung around toward her port and pressed in on the side of the "Beaver" as she did?

A. "Necanicum's" starboard side went to the "Beaver's" port—is that what I understand you?

Q. As the "Beaver" drove ahead, she pushed the nose of the "Necanicum" around, and the "Necanicum's" nose rubbed the wound on the "Beaver's" side forward of the point of impact: Is that correct? Do you remember it that way, Mr. Evers? I do not want to get your theory. Do you remember it as happening that way?

A. No, my idea of it is that the "Necanicum" came into the "Beaver" and then at the speed at which the "Beaver" was [459] going, and that the "Necanicum" at the same time was also going, she took the "Necanicum" and drove the "Necanicum" a little bit ahead and then the "Necanicum" coming back and taking herself out of there, it caused more damage forward.

(Testimony of Frank H. Evers.)

Q. So she first, according to your theory, would drive the "Necanicum" a little bit to the "Necanicum's" port and then drive her back: Is that it?

A. No, she would drive the "Necanicum's" starboard side against her starboard side.

Q. Bringing her around that way, how long would she keep in contact with her under your theory?

A. They would not keep in contact any length of time at all.

Q. What would it do?

A. Because they would be swinging the vessels by that time.

Q. They would be swinging the vessels; you mean that the blow would drive the "Necanicum" over?

A. The blow would drive the "Beaver" over, and then by that time they would be turning the wheel to help it.

Q. How many points would that have to swing the "Necanicum" to bring her around?

A. How many points would they have to swing the "Necanicum" to bring her clear around, you mean?

Q. Yes, to bring her around parallel to the "Beaver".

A. Well, if she hit her at 45 degrees?

Q. Yes.

A. 90 degrees, I mean, hit her at 90.

Q. You said 45.

A. 90 degrees on a contour with the bow?

Q. 45, you said. A. 45 with the keel.

Q. If she hit her 45 degrees by the keel, how much

(Testimony of Frank H. Evers.)

would she have to swing her around to bring her parallel? A. You would have to bring her to 45.

Q. I say parallel, how far would you have to bring her to make her parallel. It is 45 and 90, isn't it? in order to make her [460] parallel to the "Beaver," you would have to bring her around 45 degrees and 90 degrees, would you not?

A. Yes, you would have to do that.

Q. How much is that?

A. You would have to bring her around 45 and 90.

Q. How much is it? A. That is 135 degrees.

Q. Your idea is that going at 5 knots an hour the "Beaver" would drive the "Necanicum" with a hard enough blow to bring her around that way?

A. No, she did not hit her enough to bring her around that way.

Q. Suppose it should appear as a matter of fact she did swing around until she was parallel. She would have to hit her a much harder blow, wouldn't she?

A. What was the "Necanicum" doing, backing or going ahead?

Q. Presuming she did nothing at all, during that time, you would have to hit her a pretty hard blow to swing her around 135 degrees, would you not?

A. No, I don't think she would. A vessel will keep swinging quite a bit after she once starts. Another thing, it depends upon the wind and tide.

Q. Presuming that there is no tide, and the wind is blowing astern of the "Necanicum" and her bow is high.

(Testimony of Frank H. Evers.)

Mr. CAMPBELL.—Give him the draft as 16 feet aft and 4 feet forward.

A. You would not have to have much of a blow.

Mr. DENMAN.—Q. Why did you say that it would swing her around about 45 degrees going at 5 miles, and now say that hitting at 5 miles she would go around 135 degrees?

A. No, I did not. You asked me how far she would have to go around to be parallel.

Q. You said that.

A. You asked me how much it would take to get her parallel.

Q. You said first going at 5 knots.

A. Yes. [461]

Q. You said first she would not swing around parallel, and then later on you said she would: Which one of those is correct, in your opinion?

A. She would eventually become parallel, yes.

Q. Now, suppose during all this time the “Necanicum” is going astern, I mean that her propeller is reversed full speed. A. Yes.

Q. Which throws her stern to port and her bow to starboard, what would you say as to the force of a 5-knot speed on the “Beaver” throwing her around parallel?

A. If the engines were going astern, of course, that would put her bow over to starboard, and put her stern over to port—if she was going astern.

Q. I say, presume she was.

A. I think that being so much the bigger ship, the weight of the “Beaver” would bring her over.

(Testimony of Frank H. Evers.)

Q. It would not be a question of weight, but a question of a striking blow.

A. It would be a question of weight.

Q. Why weight? She only applies it at the moment of striking, don't she?

A. The vessels are there still yet, and if they started to rub, it would.

Q. I thought you said they didn't rub, they finished the blow at once?

A. They rubbed to get out of this hole.

Q. Then they did rub in the hole?

A. The stem rubbed and did the damage forward—The "Necanicum's" stem rubbed in the hole and rubbed the damage bigger.

Q. Then you think that the injury on the "Necanicum's" bow shows that the broken wood was dragged around to starboard?

A. Dragged around to starboard?

Q. You say that she was turning so that she would turn to starboard.

A. She turned parallel, and facing the same way as the "Beaver." [462]

Q. That would turn her bow, would it not, so that that it would be turning to port?

A. Her bow would be coming out to port.

Q. And it would scrape—

A. (Intg.) The port side.

Q. It would scrape the wood back to the starboard, would it not?

A. It would naturally help the wood back to starboard, it would grind it up.

(Testimony of Frank H. Evers.)

Q. So that it would hang on the starboard side?

A. It would not be hanging on the starboard side, it would be ground up as she came around.

Q. Which way?

A. She would be up against her hard, until just as she was coming up.

Q. She would be up against her hard all the time?

A. Yes.

Q. When the "Beaver" was going ahead?

A. Both vessels are in contact yet, and the "Beaver" is righting up at the same time; the "Beaver" is getting over that list that she has.

Q. Suppose the testimony should appear that when the two vessels came together, the "Necanicum" jumped back suddenly. Do you think that would properly describe what happened there?

A. I think if she jumped back she would go forward a little again.

Q. You think she would go forward again?

A. Yes.

Q. How would she go forward again if hit a strong enough blow to stop her and drive her back?

A. I think the momentum on the two vessels coming together, would be like two springs, and the damage that was sustained would leave, would go ahead a little way; they would appear to start off from one another, but I do not believe they would jump [463] back.

Q. Then your idea is that the "Beaver," coming at that velocity, *should* would strike the "Necani-

(Testimony of Frank H. Evers.)

cum" and they would come together at a point further forward above than below?

A. She would come what?

Q. That is when they came together first above, would they not? A. Yes.

Q. On account of the "Beaver's" going ahead, she would strike above at a point further forward than she would strike further below?

A. I didn't say that.

Q. If the "Beaver" is going ahead she strikes there first?

A. No, because the vessel would go with her, or she would go with the vessel, whichever one had the most momentum on, till the crushing was done.

Q. Suppose, though, that instead of entering at once, it pressed the bow in a little and finally caught at a retaining bar, what would you think then; would you think the "Necanicum" carried forward a bit before she finally entered?

A. No, I do not; I think the vessels would both go together, would stay together until the damage was finished.

Q. They would stay together?

A. Yes, because the "Beaver" was still listing and holding that vessel, there was sometime or other when they were not out of contact until the damage was finished, with the exception of the scraping that they might have been keeping up.

Q. How about the jump-back effect?

A. I don't believe it.

Q. That is to say, if the "Beaver's" witnesses

(Testimony of Frank H. Evers.)

should testify that she jumped back suddenly, you would not believe it? [464]

A. I would think they were deceived in their eyes. I think what they saw was the plates going in that fast, in front of the damage—it is always the case with the damage, it always goes in front—that is what they thought from that, they thought the vessel was coming back.

Q. That would appear that the vessel was going forward?

A. The vessel started off to come back again, that is what they would think. I do not think they would deliberately say so if they did not believe it.

Mr. DENMAN.—You are putting an expert against eye witnesses in an interesting way.

Q. How much damage would be sustained on the bluff of the starboard side of the “Necanicum” as she swung around in the way you have described? Would there be anything more than scratches in her paint?

A. I don’t think there would be much more than scratches, or something of that sort. The contour of the plate would be in such a nice curvy way that I don’t think it would damage her much but on the starboard side. [465]

Q. I thought you said the angles would be higher on those plates, as you have drawn it?

A. No; here they are right here. This is where the ragged side was in here.

Mr. CAMPBELL.—Q. Opposite frame 4?

A. Yes, sir. Here is where she swung around in

(Testimony of Frank H. Evers.)

here, and she eased herself off here. What there was of this long stem was keeping her up—that is, what was not chewed off.

Mr. DENMAN.—Q. You think the point she finally penetrated was at 5, do you?

A. No, I don't think so. It was at 4. She was at the point 4 but before she was finished she was at 4½. Here is the contour of the ship going in.

Q. Tell me whether or not the center line of the “Necanicum” as you have drawn it there is at an angle of 45 degrees to the “Beaver”?

A. No, it is not.

Q. You did not draw it then the way you thought it was? A. It is not quite.

Q. Will you draw it as it properly should be?

A. Yes, sir.

Q. Where would that have to strike the “Beaver,” presuming that the “Necanicum” were dead in the water, in order to reach the point 4 as the “Beaver” went ahead?

A. What do you mean? Do you mean to bring it in to here?

Q. To bring it in to there. Presuming the “Necanicum” is not moving ahead at all, but that the “Beaver” was moving ahead, where would the striking point have to be in order to have the forward motion of the “Beaver” cut the side down to that point?

Mr. CAMPBELL.—Of course, Mr. Denman, your question assumes that it could be done. [466]

Mr. DENMAN.—I want to know where she would

(Testimony of Frank H. Evers.)

have to strike if she were moving forward in order to produce that physical fact?

Mr. CAMPBELL.—That is, if it could be done as a physical fact.

Mr. DENMAN.—Don't coach the witness, Mr. Campbell.

Mr. CAMPBELL.—I have a right to ask whether you are assuming that it could be done as a physical fact.

Mr. DENMAN.—You know perfectly well what the question means and you are trying to coach the witness to say it is impossible to do it as a physical fact.

Mr. CAMPBELL.—Not at all.

A. I don't quite understand the question, to tell the truth.

Q. Then you have not received any instructions, have you? A. No.

Mr. DENMAN.—Q. Now, will you show me where the two vessels would have to come together so that the forward motion of the "Beaver" would bring the "Necanicum" winding up at the point 4?

A. The "Necanicum" would have to be coming to.

Q. No, I am presuming now she is lying dead in the water at this angle?

A. I don't think she could do it.

Q. Why?

A. She could not do that damage and shove that right in there with the "Necanicum" standing still.

Q. Supposing she struck at that point, the "Ne-

(Testimony of Frank H. Evers.)

canicum" lying dead in the water and the "Beaver" going ahead about 10 knots?

A. I don't believe you could do that extent of damage with the "Necanicum" standing still.

Q. You just said the combined force—

A. (Intg.) They both have some impelling movements to keep them [467] in the one position; they are both under control.

Q. How were they under control when they struck? What is the mass of the "Necanicum" in the water—how many tons?

A. I don't know. I don't know the tonnage of her even now. I saw her at the time—I saw her afterwards, after she was all done and cleaned up and everything. She is a steam schooner.

Q. Do you know what the tonnage of the "Beaver" is?

A. I have it in my pocket. I could not tell it now without referring to my notes, I handle so many of them you know.

Q. Is it about 5,000 tons?

A. I can give it to you if I refer to my notes.

Q. So, in your opinion, if the "Beaver" were making 10 knots and struck the "Necanicum" in the position I have indicated the damage that occurred could not have been inflicted upon her?

A. No, sir.

Q. What would be the reason why?

A. Because I think she would take away the upper works of the "Beaver" and in doing so carry the damage along for 30 or 40 feet on the "Beaver"

(Testimony of Frank H. Evers.)

until she got to the end of the bow where she flares and everything, and at that time she would clear herself of this vessel.

Q. Suppose we have a slightly greater angle between the two and the forward motion of the "Beaver" has a hooking effect?

A. She would have taken the stem out of the "Necanicum" and kept the "Necanicum" turning over.

Q. That would be the condition, you say?

A. As you get to a greater angle. I won't say at that angle.

Q. You would not say an exact angle anyhow, would you?

A. No, I would not say an exact angle.

Q. The first position I refer to is position 1; the second position is position 2. This is position 3. Now, somewhere between the position 1 and the position 3 you would get an [468] impelling effect as the "Beaver" drove on to the "Necanicum," but you will not say exactly what angle it is?

A. I don't think you will get an impelling effect on those vessels unless they were both going ahead as far down as we have it on this vessel, by any means. You would get a damage on the upper plates but not on the lower ones.

Q. In other words, one vessel cannot impel itself on another unless both are going?

A. Yes, they can on the upper plates, and the plates are sticking up, but they could not get it as far down in the water and do as much damage as was done to this vessel—the "Beaver."

(Testimony of Frank H. Evers.)

Q. Why must the blow be a combination of the two rather than the impelling force of the great momentum of the one on the other lying dead?

A. Because a vessel is coming toward you and holding herself steady for the blow; the other vessel is going away from you and therefore she has not the resistance to throw away from her. Now, then, if the vessel were standing still in the water, like a log is, if you have a log in the water the minute you get up to it part of the sea in front of you will carry it away from you; you don't need to hit it. The "Necanicum" did not have any cargo in her at all, as I understand it, she was light in the water; her stem was 14 inches on the incline from the water-line, about 14 inches, I guess it would be, 14 inches from being straight when she hit the other vessel.

Q. The testimony is that it is a foot.

A. I am only taking it from my experience, about what it would be. So she was very light in the water.

Q. Now, Mr. Evers, have you any notes at all that you took when you made these observations? [469]

A. No, sir. I have my report that I passed in, and I have it in my pocket still.

Q. Have you it here in your pocket?

A. Yes, sir. Do you want the gentleman to have a copy of it, Mr. Campbell?

Mr. CAMPBELL.—Yes.

A. (Continuing.) You can have a copy of it for your files. It is not signed. I will sign it if you want me to.

(Testimony of Frank H. Evers.)

Mr. DENMAN.—Q. Were you retained the same day that Mr. Dickie was by Mr. Campbell?

A. I saw Mr. Dickie over there taking photographs, and I was with him the best part of the day and I assisted him in some parts that he did.

Mr. CAMPBELL.—Q. Mr. Evers, when was the first time that I ever discussed this case with you, to go over this case?

A. Yesterday was the only time I ever spoke to you in my life, I think, on business really.

Q. What time was it yesterday?

A. In the evening; it was pretty late in the evening too.

Mr. DENMAN.—Q. After Captain Pillsbury's deposition yesterday?

A. We did not talk the case over even at that. Mr. Campbell only asked me simply if I had ever made a report. It was the first time he really knew yesterday that I had made a report; and I said to him, "Yes, the vessel is classed in our book," and I said I made a report. He said, "Where is it?" I said, "You can get it from Mr. Blair, if you wish it."

Q. And you did not discuss any of the questions that Mr. Campbell has asked you to-day?

A. No, sir, that he has asked me that I know of. We discussed it very, very little. He asked me if I could come into court for him next day, and I said that I was engaged until 11 o'clock, that I had 14 furnaces to examine; [470] and he said, "I will try and make it for you at 11 o'clock."

Q. And you came around to his office last night?

(Testimony of Frank H. Evers.)

A. I was around at his office when you were inside last night, and I spoke to Mr. Burnett. And I didn't have the report in my pocket then. Mr. Campbell never saw my report until this morning. And he did not get it from me then.

Q. You didn't go over any of the pictures at that time, did you?

A. No, sir, but I have a copy of the pictures.

Q. But you didn't look at any of the pictures in Mr. Campbell's office at that time?

A. No. I think we saw that big one.

Q. Mr. Campbell didn't ask you any questions about that?

A. No. I said that I had a copy of those pictures.

Q. That was all? A. Yes, sir.

Q. Mr. Campbell did not ask you any questions about any of the damage shown on the picture?

A. No, he simply asked me if I had made my report, and I said I had done so.

Q. He brought you up to the office, did he?

A. Yes, and I had supper with him. He kept me away from supper at home, so I made him buy supper for me.

Q. He did not ask you any questions about the damage?

A. He just asked me if I would go into court, and all that sort of thing, and I said yes. He said, "Do you remember the case?" and I said "No, I don't remember much about it, I will have to look it up when I get down to the office." He said, "If you come, bring your notes," and I said, "I will bring them."

Isn't that about it, Mr. Campbell?

Mr. DENMAN.—That is all.

Mr. CAMPBELL.—I think that is all. [471]

Mr. CAMPBELL.—I offer in evidence at this time the bridge log of the “Necanicum,” and call counsel’s attention to two changes which have been made upon the log pertaining to the time of the collision and the mileage run immediately before and up to the moment of the collision.

Mr. DENMAN.—Will you point them out to me, Mr. Campbell?

Mr. CAMPBELL.—Yes. You will find that the item “2 P. M.”—the log reads “2 P. M. log 481 3/4”; it originally read, as I read it, “2:20 P. M., collision with the steamer “Beaver,” turned back southeast half east, 484 1/2.” It has been changed to read: “2:25, collision with ‘Beaver.’ ” You can see that by an examination with the microscope, that the nought has been made into a 5. By holding the log up to the light you will find there has been an erasure in the mileage at that time; it goes right through the page. If you take the original log, Mr. Denman, that you handed to me on the examination of the Master, that is, in the mate’s log, which was supposed to have been a copy of this log, the time is there recorded as of 2:20, and that an erasure has also been made in the figure “8” in the mileage, 481 3/4 as I see it. That is in evidence here. I think it is right here on the desk.

Mr. DENMAN.—I object to the introduction of the log at this time for the reason that at the taking

of the depositions of the master and the mate we were unable to produce the log and the depositions were kept open so that Mr. Campbell could call the attention of the witnesses to any discrepancy in the log at the time that it was produced. I later procured it and turned it over to Mr. Campbell at a period of about four months ago, I think it was; am I correct in that, Mr. Campbell?

Mr. CAMPBELL.—Yes, you delivered the log to me before I went East in July. [472]

Mr. DENMAN.—And he has never notified me of any defect or any question about any of these entries. He has never asked for the recalling of any of the witnesses and has not permitted me to recall them. I don't know where they are now.

Mr. CAMPBELL.—Your master is in town to-day and so is your mate. The master has been here for some time and your mate has been here for some days. You will remember, I asked repeatedly for the production of the log. As a matter of fact, I did not discover this until about a week ago when I commenced to prepare for the case. At that time I had photographs of the log made.

Mr. DENMAN.—I don't see what relevancy it has, anyway. There is no attempt to change the description of the occurrence.

Mr. CAMPBELL.—There is a change made in the time of the collision, which materially affects the speed; and there is a change in the mileage run. In the "Exhibit 4" attached to the depositions of the master and the mate I show you that the figure 481,

which is given as the mileage opposite the hour 2 P. M., has been changed upon that log apparently and that is the one which has been changed on the bridge log. The description which appears under the abbreviation "N. B." in the mate's log, the official log is different and contains matter not contained in the original bridge log which is descriptive of the collision. Undoubtedly you have compared these, Mr. Denman.

Mr. DENMAN.—No, I have not; I have not compared the two.

Mr. CAMPBELL.—And you will find that on the mate's log, "Exhibit 4," the hour of the collision is given as 2:20; so that the change in the bridge log must have been made subsequent to the time that this mate's log is supposed to have been copied from the bridge log.

Mr. DENMAN.—As a matter of fact, the log was sent to me [473] and was taken immediately to Mr. Campbell before I looked it over, and I think I sent it to him in the original paper it came to me in.

The COURT.—Well, we will take a recess now for a few minutes and you gentlemen can examine that log.

(At the conclusion of a 5-minute recess the case was resumed as follows:)

Mr. DENMAN.—If the Court please, I will withdraw objection to the admission of the log. I have examined the log and I believe that the changes in this log were made subsequent to the writing up of the final log. They are absolutely irrelevant so far

as I can see to any point I know of in the case. If they are to be made the subject of any criticism on the testimony of these two men, however, I should say that that chance has been lost in view of the fact that four months have gone by and I have not been informed of any discrepancy.

Mr. CAMPBELL.—Mr. Denman, may I ask you a question?

Mr. DENMAN.—You may.

Mr. CAMPBELL.—From what source have you discovered now since the Court took the recess that that log has been changed since the writing of the other log?

Mr. DENMAN.—Why, because that log has on it the time 2:25, written manifestly in a different pencil and different handwriting. And this log was written up for the permanent record of the ship, and this log correctly describes the circumstances as your people contend they are with regard to about the time of the collision. And the entire fabric of the story seems to fit.

Mr. CAMPBELL.—What I was getting at was this; whether you have acquired information since the Court took its recess as to when that change was made in the bridge-log. [474]

Mr. DENMAN.—It is simply my inference that when one was copied into the other they were evidently alike and someone since that time changed it to 2:25; there is no other motive for it.

Mr. CAMPBELL.—Can you make any explanation for the change of the figure $481\frac{3}{4}$ in both logs?

Mr. DENMAN.—I don't think there has been any change. If there has been I cannot see the relevancy of it with reference to the actual time of the occurrences. There is no dispute between us on that score at all.

Mr. CAMPBELL.—Well, it will go to the credibility of your witnesses. You have produced logs here which have been changed. They have been changed in a very material point. If you assume the mileage given in your log at 2 o'clock as $481\frac{3}{4}$ is correct and the mileage at the moment of the collision was $481\frac{1}{2}$ —

Mr. DENMAN.—That is not at the time of the collision, that is returning to San Francisco.

Mr. CAMPBELL.—2:20 P. M. is stated in your bridge-log as the time of the collision. It was before it was changed. That gave you a speed up to the moment of the collision of $8\frac{1}{4}$ knots per hour. The change of time of the collision from 2:20 to 2:25 reduces that speed to 6.6 knots per hour.

Mr. DENMAN.—That is clearly a mistake. The contention always has been that it was $8\frac{1}{4}$. The captain made the statement. There never has been any other contention. The matter is clearly irrelevant.

Mr. COLLISION.—That is a matter for us to take up at some other time. I offer the logs in evidence.

Mr. DENMAN.—One is in already.

(The log was here marked "Libelant's Exhibit 11.")

Mr. CAMPBELL.—That completes our case.
[475]

Testimony of Christian Emanuelson, for Claimant.

CHRISTIAN EMANUELSON, called for the claimant, sworn.

Mr. DENMAN.—Q. What is your occupation? What do you do? What is your business?

A. To be a witness at this trial, sir.

Q. Oh, I know, but what was your business before that? Were you a sailor on the “Necanicum” on the day of the collision with the “Beaver”?

A. Yes, sir.

Q. How long had you been at sea?

A. Oh, I have been at sea for quite a few years, from the old country.

Q. What is the old country? A. Norway.

Q. Do you remember the day of the collision?

A. Yes, sir.

Q. Where were you at 15 minutes before the collision? A. On the lookout.

Q. You were on the lookout? A. Yes, sir.

Q. Who sent you there? A. The first officer.

Q. What was the condition of the weather when you went there? A. It was foggy.

Q. Did any conversation or words pass between you and the mate while you were on the lookout?

A. Yes, sir.

Q. What were they?

A. He first hollered if I heard any whistle.

Q. What did you answer?

A. I said no, I didn't hear any.

Q. What happened then?

A. Then we seen the “Beaver.”

(Testimony of Christian Emanuelson.)

Q. Then you saw the "Beaver"?

A. Yes, sir, we saw the "Beaver."

Q. Where was she when you saw her with reference to your bow?

A. She was a point on the starboard bow.

Q. She was about a point on the starboard bow?

A. Yes, sir; a good point.

Q. Did you report her? A. Yes, sir.

Q. What did you say?

A. I hollered, "a ship on the starboard bow."

[476]

Q. What happened then?

A. The captain blowed two whistles.

Q. Did you watch the "Beaver"?

A. I watched the "Beaver," yes.

Q. What did she do after the two whistles were blown? A. She answered with one whistle.

Q. What direction did she turn?

A. She ported her helm.

Q. Where did that carry her in the water with reference to your bow?

A. It carried her across our bow.

Q. It carried her across your bow? A. Yes, sir.

Q. What was done after you saw her crossing your bow?

A. After I saw her crossing the bow then she went past us and I didn't see her any more.

Q. I am speaking now of when you first saw her turn to go across your bow, what was done on your ship? A. Yes, we were backing our ship.

Q. How long were you backing before the colli-

(Testimony of Christian Emanuelson.)

sion? A. Well, I can't exactly tell that.

Q. Was it 5 minutes—2 minutes?

A. It was a very short time. I cannot exactly tell how many minutes.

Q. Was it as much as 3 minutes?

A. I don't think so—well, it may be 3 minutes; it may be; I can't exactly tell how many minutes.

Q. Was it more than one minute?

A. I think it must be more than one minute.

Q. How could you tell she was backing?

A. I was watching the "Beaver's" bow.

Q. How could you tell that your vessel was backing? Did you feel any motion?

A. No, I didn't feel any motion but I was watching the "Beaver's" bow and I took a bearing on the "Beaver's" bow, and I seen we were backing by the "Beaver's" bow. [477]

Q. Where were you when the vessels struck?

A. On the forecastle-head.

Q. What portion of the forecastle-head?

A. I was on the starboard side.

Q. And how far aft at the moment of impact when they struck? Were you in the forward or the after portion of the forecastle then?

A. I was on the after part when she struck.

Q. What happened to you?

A. I was thrown off the forecastle-head, sir.

Q. What did you do then?

A. I ran right up on the forecastle-head again.

Q. Where was the "Beaver" when you got up on the forecastle-head?

(Testimony of Christian Emanuelson.)

A. Then she passed our bow and I only seen her about a minute or so.

Q. What speed was she going at when she struck you?

A. I cannot say how much speed, but she passed us pretty speedy.

Q. Did she have any foam under the bow?

A. Oh, yes; she had foam on the bow.

Mr. CAMPBELL.—Don't lead the witness.

Mr. DENMAN.—Q. I mean could you see it?

A. Oh, yes, I could see the foam on the bow.

Q. Was there any injury on your vessel, on the starboard side?

A. I don't understand the question.

Q. Was there any injury to your port anchor?

A. No; I don't think so.

Q. Was there any injury to the hawse-pipe of the port anchor, on the port side of your vessel?

A. When she struck the bow then the port hawse-pipe broke.

Q. I ask you if this Exhibit "C" of claimant, a picture of the "Necanicum," correctly shows the injuries sustained by the "Necanicum's" bow? Is that the way she looked? [478]

A. That is the way she looked.

Q. Was there any injury on the starboard side of the "Necanicum"? A. Not on the starboard side.

Q. Did she touch the ship on the starboard side at all? A. No, sir; she just touched the stem.

Q. She just touched the stem? A. Yes, sir.

Q. And the port anchor?

(Testimony of Christian Emanuelson.)

A. She did not touch the port anchor. I don't think she touched the port anchor.

Q. How did the anchor jamb back?

A. I think the way she struck. I can't explain it but I don't think the "Beaver" struck it. It was the spring in the ship and then the hawse-pipe broke.

Q. Do you notice here the fluke or the point of it is actually cut into the side of the ship?

A. Yes, sir; she is cut into the side of the ship.

Q. Then it might have been by striking—

Mr. CAMPBELL.—Mr. Denman, I object to your leading the witness. Let him state what he knows about it.

Mr. DENMAN.—I withdraw the question.

Q. Which way did the blow of the "Beaver" swing the "Necanicum"?

A. When she touched she swung the "Necanicum"—

Q. Which way—to her port?

A. She swung the "Necanicum" to her port; yes.

Q. How far off was the "Beaver" when you first saw her, as you estimate it?

A. She was $\frac{1}{4}$ or $\frac{1}{2}$ a mile.

Q. Could she have been as much as $\frac{1}{2}$ a mile?

A. I cannot say just exactly, but not over $\frac{1}{2}$ a mile.

Q. What would you say as between $\frac{1}{4}$ and $\frac{1}{2}$ —which figure would you place it at?

A. Well, I cannot exactly tell you.

Q. What is the reason for that? Is it because you cannot [479] recall it?

A. Repeat that again, please.

(Testimony of Christian Emanuelson.)

The COURT.—Q. Was it nearer $\frac{1}{4}$ or nearer $\frac{1}{2}$ a mile?

A. Oh, well, it was nearer $\frac{1}{2}$ a mile.

Mr. DENMAN.—Q. What was it caused you to fall over off the after end of the forecastle-head?

A. Oh, well, it was impossible for me to stay on my feet when she struck.

Q. It was impossible for you to stay on your feet?

A. No, I could not stay on my feet.

Cross-examination.

Mr. CAMPBELL.—Q. What time did you go on the lookout?

A. A little after two o'clock, sir.

Q. Whom did you replace?

A. Well, it was not foggy between 1 and 2.

Q. And you didn't have anybody on the lookout between 1 and 2, did you?

A. I don't think they had. I don't remember; I can't remember it.

Q. It is not customary on your steam schooner to carry a lookout all the time, is it? A. Yes, sir.

Q. Why didn't you have one between 1 and 2?

Mr. DENMAN.—He said he could not remember whether they had one, or not.

A. I could not remember it.

Mr. CAMPBELL.—Q. Don't you remember they did not have one?

A. That is what I can't remember.

Q. Who was your watch mate? When did you come on watch—at 12 o'clock?

A. I came on watch at half-past 12.

(Testimony of Christian Emanuelson.)

Q. What did you stand on that vessel—six-hour watches? A. Six-hour watches.

Q. Who was your watch mate?

A. He was the wheelman, and Prendegast. [480]

Q. What were you doing between 12 and 2 o'clock when you went on the watch?

A. I was at the wheel.

Q. You were at the wheel? A. Yes, sir.

Q. You don't know whether anybody was on the lookout up to 2 o'clock, do you?

A. No, I do not know. I can't remember that.

Q. Is it not a fact that on these steam schooners you don't always carry lookouts?

A. We always carry a lookout when it is foggy.

Q. Only when it is foggy?

A. When it is foggy.

Q. When it comes foggy the mate tells you to go on the lookout? A. Yes, sir.

Q. And when the fog ceases he pulls you off the lookout? A. Yes, when it ceases he pulls you off.

Q. How long had you been on the "Necanicum" at that time?

A. I joined her on the 4th of July, 1913.

Q. And all the time you were on the "Necanicum" you only had a lookout when it was foggy?

A. When it was foggy and heavy rain.

Q. You had not seen the "Beaver" up to the time that the mate hollered to you from the bridge, had you? A. No, sir.

Q. After the mate hollered to you from the bridge was the first time that you ever knew that the

(Testimony of Christian Emanuelson.)

“Beaver” was ahead of you?

A. Well, the mate said, “Go on the lookout.” I just came from the wheel and he said, “Go on the lookout; we have got a ship ahead.”

Q. That is what he said?

A. That is what he said, and “Watch the whistle,” he said.

Q. And when you saw the “Beaver” you judge she was about a point on the starboard bow?

A. Yes, sir.

Q. Might she have been as much as 2 points?

A. It might be that she was a point or a point and a half; I cannot say exactly. We were supposed to lookout to see that the [481] whole course was clear. We could see the “Beaver’s” starboard side clear from fore and aft.

Q. Might she have been as much as 2 points on your starboard bow?

A. I would not have anything to say whether it was 2 points or one point, but it was a good one point.

Q. Was it as much as 3 points on your starboard bow?

A. She was that when she crossed our bow, her stern was 3 or 4 points.

Q. I am asking you when you saw her first?

A. Well, when I saw her first it was a good point on our starboard bow.

Q. Was the mate on the bridge of your vessel in just as good a position to see her as you were?

A. Yes, sir.

Q. Before you saw the “Beaver” at all the mate

(Testimony of Christian Emanuelson.)

asked you if you heard the "Beaver's" whistle?

A. Yes, sir.

Q. Did he use the word "Beaver"?

A. No, he did not say the "Beaver's" whistle.

Q. What did he ask you? Do you remember the mate asking you "Did you hear the 'Beaver's' whistle"?

A. Yes, sir.

Q. Do you remember his using the word "Beaver"?

A. Yes; the mate hollered twice if we heard the "Beaver's" whistle; he hollered first once, "Did you hear any whistles?" and I said, "No," and then a little while after he hollered again, "Can you hear any whistle?" and I said, "No." I never heard the "Beaver's" whistle.

Q. My question is, Did he ask you if you heard the "Beaver's" whistle? Did he use the word "Beaver"? Is that your recollection, that he said to you "Did you hear the 'Beaver's' whistle?"

A. No, he did not say the whistle of the "Beaver."

Q. Is it your recollection now that the mate asked you if you [482] heard the "Beaver's" whistle?

A. Oh, no; the mate once asked if we heard any whistle.

Q. If you heard any whistle? A. Yes, sir.

Q. And you said you didn't hear any whistle?

A. Yes, before the collision.

Q. Yes, we are speaking now of before the collision. A. All right.

Q. And did he ask you again if you heard the whistle? A. Yes, sir.

(Testimony of Christian Emanuelson.)

Q. And what did you reply the second time?

A. I said I could not hear no whistle.

Q. What did you reply the first time?

A. I could not hear no whistle, both times.

Q. Do you recall ever answering the mate, saying that you could not hear the whistle but you could see the steam and the whistle had water in it?

A. I didn't notice that; I didn't notice that the whistle was—

Q. You didn't notice that?

The COURT.—Don't get nervous now. Just imagine you are still on the forecastle head.

Mr. CAMPBELL.—Q. Show me on this picture of the “Necanicum” where you stood at the time of the collision.

A. At the time of the collision I stood right before that yard there.

Q. Alongside of the Sampson post?

A. No. I was right here before the collision, and then I was right here by the companion, I was going to go down but at the time she struck I went off.

Q. Where were you standing at the time you were knocked off—right on the break of the forecastle?

A. Right on the break of the forecastle, a couple or 3 or 4 feet in on the forecastle. I cannot tell just exactly how far [483] I stood on there, but I got thrown off.

Q. And about at the point where I have my pencil?

A. Yes, sir; about there.

Q. Is that correct (indicating)?

A. Yes, sir; and I fell on the main deck.

Q. Is that the point (indicating)?

(Testimony of Christian Emanuelson.)

A. Yes, sir; about there.

Q. The point at which I have drawn this line that I have marked "X"? A. Yes, sir.

Q. And about 3 or 4 feet forward of the after end of the forecastle-head? A. Yes, sir.

Q. And you were knocked from there down to the deck? A. Yes, sir.

Q. And how far is the top of the forecastle-head from the deck? A. I don't know how high it is.

Q. It is over your head, is it not?

A. It is more than over my head.

Q. You can walk well in under the forecastle-head standing up? A. Yes, sir.

Q. Six feet, would you say?

A. I would not say how many it was. The builder would know that.

Q. You didn't hear the "Beaver's" whistle at all until after the collision? A. No, sir.

Q. And after the collision you heard her whistle?

A. Yes; first the "Beaver" and then the "Necanicum" blew two whistles to pass on the starboard, to make sure to pass on the starboard.

Q. When you went ahead after the collision?

A. No, that was just before the collision, when we saw each other.

Q. I am speaking about the "Beaver's" whistle. Did you hear [484] any whistles from the "Beaver" before the collision?

A. No, sir; no fog whistles.

Q. Did you hear any of the "Beaver's" whistles after the collision?

(Testimony of Christian Emanuelson.)

A. Yes, sir; after the collision we heard the "Beaver's" whistles.

Q. What were the whistles you heard after the collision?

A. Those were the fog whistles she blew then. Then we could not see her.

Q. So you never reported a whistle to the bridge at all?

A. No, I did not report them signal whistles; they could hear them from the bridge themselves.

Q. Did you hear the "Beaver's" fog-whistle prior to the collision, before the collision?

A. No; I did not hear the "Beaver's" whistle before the collision.

Q. Did you at any time see steam coming out of the "Beaver's" whistle and could not hear it?

A. No.

Q. You never reported that to the bridge?

A. No, sir.

Q. You were in just as good a position on the fore-castle-head to hear the "Beaver's" whistle as a man would be on the after end of the "Necanicum," were you not? You could hear the whistle ahead from your position on the fore-castle-head just as clear as a man could hear the same whistle on the after end of the steamer, could you not?

A. Yes, sir.

Redirect Examination.

Mr. DENMAN.—Q. You say that you heard no fog-whistles from the "Beaver" before the collision?

A. No, I did not hear no fog-whistle.

(Testimony of Christian Emanuelson.)

Q. Did you hear any passing whistle from the "Beaver"? A. Yes, sir, I heard one whistle.

Q. One whistle? A. Yes, sir. [485]

Q. How soon was that after you first saw her?

A. That was as soon as the "Necanicum" blowed the two, the "Beaver" answered with one.

Recross-examination.

Mr. CAMPBELL.—Q. Why did you just tell me a moment ago you did not report any whistles to the bridge?

Mr. DENMAN.—He said no fog-whistles.

Mr. CAMPBELL.—I did not ask him about fog-whistles.

A. I did not report them because they could hear them on the bridge.

Q. Did you report any whistles to the bridge at all from the "Beaver"?

A. No, sir; I did not report it.

Q. When you hear a passing whistle given by a steamer that is approaching you within a half mile, don't you know that the law requires you to report that to the bridge? A. Yes, sir.

Q. Well, why didn't you do it in this case?

A. Because the "Beaver" he blowed first one whistle and then we blew three as soon as he blew that whistle.

Q. You heard three whistles from the "Beaver" afterwards, did you? A. Yes, sir.

Q. Why didn't you tell me awhile ago that you heard those three whistles? Did you report those three whistles to the bridge of your vessel?

A. No, sir; I didn't report them three whistles.

(Testimony of Christian Emanuelson.)

Q. Did you tell the mate of your vessel that you could not hear any whistles from the "Beaver"?

A. Yes, excuse me— fog-whistles I did not hear.

Q. When did you tell the mate of your vessel that—before you saw the "Beaver" and while she was still in the fog?

A. Yes, sir; and then the officers on the bridge said the "Beaver." [486]

Q. Your chief mate was on the bridge, was he?

A. Yes, sir.

Q. In his shirt sleeves?

A. Well, I can't remember if he was in his shirt sleeves.

Q. Don't you remember the mate did not have any coat to work in on that vessel?

A. No, I cannot remember that.

Q. Did he have a coat to work in?

A. Oh, they generally use a coat; I don't know what he had on at that time.

Q. How long had you been on the vessel—from July? A. From July until it happened.

Q. Don't you know that the mate of your vessel did not have a coat to work in for several weeks before the collision?

A. Oh, yes; sometimes he had a coat on and sometimes he had not.

Q. Before you saw the "Beaver" at all the mate asked you if you heard any whistles from a steamer, did he not? A. Yes.

Q. And you said that you did not hear any?

A. Did not hear any.

(Testimony of Christian Emanuelson.)

Q. Now, after the "Beaver" came into sight he asked you again if you heard any whistles?

A. No, sir; not after the "Beaver" came into sight.

Q. How many times did he ask you if you heard any whistles? A. Twice.

Q. Both times before—

A. (Intg.) Before he saw her.

Q. Before you saw her? A. Yes, sir..

Q. Then the mate of your vessel never asked you after the "Beaver" came into sight whether you heard any whistles from the "Beaver"? That question was never asked you by the mate of your vessel after the "Beaver" came into sight?

A. No, sir.

Q. And you stood there on the lookout of your vessel and heard the "Beaver" cross-signal the "Necanicum," did you? A. Yes, sir. [487]

Q. And you did not report that violation of the rules of the road to the bridge—or the whistle?

A. Only I reported that I could see her. As soon as I saw the "Beaver" I reported, "There she is."

Q. How long have you been going to sea?

A. I have been going to sea for quite awhile, not on a steamer, on a sailing vessel.

Q. You are the man on board of the "Necanicum" who holds papers, are you not? Don't you hold second mate's papers in Norway or in Sweden?

A. Yes, sir.

Q. You know what a cross-signal is, don't you?

A. Yes, sir; but I was on sailing vessels.

(Testimony of Christian Emanuelson.)

Q. Do you know whether or not it is permissible on steam-vessels for one vessel to answer with one whistle—a passing whistle—two passing whistles that have been given? What do you call it? What do you sailors call it when one vessel blows one whistle in answer to two whistles which have just been given by another vessel that you are meeting? You call it a cross-signal, do you not? A. Yes—

Q. Is not that what you call it, a cross-signal?

A. That is what they call passing signals.

Q. When your vessel blew two passing whistles it indicated a starboarding of your helm, did it not?

A. Yes, sir.

Q. And when you received one from the “Beaver” it indicated a porting of her helm, did it not?

A. Yes, sir.

Q. Is that permissible amongst vessels, to answer one whistle with two whistles?

A. No, sir; the “Beaver” should have answered them two whistles with two.

Q. Then when you heard the one whistle from the “Beaver” you knew that the “Beaver” was violating the rules of the road, [488] didn’t you? When you heard one whistle from the “Beaver” in answer to the “Necanicum’s” two whistles, you knew that the “Beaver” was not doing the right thing, did you not? A. Yes, sir.

Q. And you did not report that violation to the bridge, did you? You did not report that to the bridge of your vessel?

A. No, sir; I did not report that.

(Testimony of Christian Emanuelson.)

Q. After that you heard three whistles blown by the "Beaver"? A. Yes, sir.

Q. And you did not report those to the bridge of your vessel?

A. No, I did not report those.

Further Redirect Examination.

Mr. DENMAN.—Q. Where are you working now?

A. I am working for the Northern Redwood Lumber Company.

Q. You say you went on the bridge about 2 o'clock?

A. Yes, sir; I went on the forecastle-head a little after 2.

The COURT.—Q. On the lookout?

A. On the lookout; yes, sir.

Mr. DENMAN.—Q. A little after 2 o'clock?

A. Yes, sir.

Q. How soon after you got there did Beckwith make this inquiry?

A. Well, I was there a little while and then Beckwith hollered if I heard any whistle, a fog-whistle.

Q. Did he tell you anything about seeing the "Beaver" at about 2 o'clock, at a distance of 4 or 5 miles ahead, when you went out there first?

A. Yes, sir, he said "we have got a ship ahead."

Q. That is when he first sent you out on the lookout? A. Yes, sir, when he sent me out.

Q. How long was that before the collision?

A. It must have been about 15 minutes.

Q. 15 minutes before the collision?

A. Yes, sir. [489]

(Testimony of W. Prendegast.)

Mr. DENMAN.—I will say in this connection, if your Honor please, that the testimony of the mate is that at about 2 o'clock the fog lifted and he saw the "Beaver" ahead, and it settled down again and he sent out this man to report approaching vessels.

Testimony of W. Prendegast, for Claimant.

W. PRENDEGAST, called for the claimant, sworn.

Mr. DENMAN.—Q. Were you on the "Necanicum" at the time of the collision with the "Beaver"?

A. I was, sir.

Q. What were you on her? A. Sailor.

Q. How long had you been a sailor before that?

A. Oh, about 4 or 5 years, off and on.

Q. Whereabouts were you at about 2 o'clock on that day, in the afternoon?

A. At about 2 o'clock?

Q. Yes.

A. Well, I was in the lifeboat, port side—no, on the starboard side.

Q. Where is that life-boat located with reference to the bridge? A. 20 feet aft, I believe.

Q. Aft of the bridge? A. Yes, sir.

Q. What were you doing in the life-boat?

A. I was washing it out.

Q. How was the bridge at that time with reference to any housing on it? Did it have any housing on it? A. No, sir.

Q. Were there any quarters for the captain on the bridge? A. Not at that time.

(Testimony of W. Prendegast.)

Q. Who was on the bridge in command while you were in the life-boat? A. Well, the first mate.

Q. What is his name? A. Mr. Beckwith.

Q. What was the condition of the weather just prior to the collision? [490]

A. Well, it was foggy.

Q. Did you see the "Beaver" before the collision?

A. Yes, sir.

Q. Whereabouts did you see her?

A. Well, I should judge about 2 points to the starboard when I first saw her.

Q. Starboard of your boat? A. Yes, sir.

Q. Were any signals blown from your boat?

A. Yes, sir; they were blowing the usual fog-signals.

Q. Were any signals blown when you sighted the "Beaver" on your starboard bow, passing signals?

A. Yes, the mate blew two whistles.

Q. Did he give any order to the helmsman that you know of?

A. I heard him say—I think his orders were "starboard"; I don't remember how much, or anything like that.

Q. You heard him say "starboard"?

A. Yes, sir.

Q. That was when the two whistles were blown?

A. Yes, sir.

Q. Did you notice the "Beaver" at that time?

A. Yes, sir.

Q. What happened on the "Beaver" when the two whistles were blown?

(Testimony of W. Prendegast.)

A. Well, she seemed immediately starting a cross-swing, swinging across; at the time I first saw her she seemed to me to start to swing.

Q. Where was the captain of the ship—Captain Keegan—at this time?

A. What time was that?

Q. When you first sighted the “Beaver”?

A. I did not see him at all.

Q. When did he come on deck?

A. Almost immediately after the two whistles were blown.

Q. What happened then? Did he give any orders?

A. He said something “what is he doing,” or something to that effect, to the mate, and he changed the course again.

Mr. CAMPBELL.—Q. What is that?

A. He said, “What is [491] that fellow doing?” or something of that kind to the mate.

Mr. DENMAN.—Q. And changed the course again?

A. I heard him say “hard aport.”

Q. What else was done? Was anything done with regard to the speed of the vessel?

A. Well, almost immediately after he blew three whistles.

Q. Did he do anything else? What did that indicate?

A. Well, that is supposed to be to go astern.

Q. Did he do anything else?

A. No, I don't think so.

(Testimony of W. Prendegast.)

Q. Did he just blow the three whistles, full speed astern, and expect that to go down to the engineer? Did you go astern?

A. Well, I seen him reach for the telegraph.

Q. When was that?

A. That was right as soon as he blew the three whistles, he reached for the telegraph; it was right on that side, the telegraph is on that side of the bridge.

Q. And what happened then?

A. He pulled it over.

Q. Did the vessel reverse?

A. Well, I suppose it did.

Q. Could you feel the jar of the reversing?

A. Yes, sir; you can tell generally by the vibration of the vessel when they start to do that.

Q. Did you feel it on that day? A. Yes, sir.

Q. How long do you think she was reversing before the collision?

A. Well, it could not be—about 2 minutes, I should judge, a minute and a half or 2 minutes.

Q. What happened when the two vessels came together?

A. Well, we all got knocked down. I got knocked down, but I did not get knocked out of the boat. I was in the boat all the time. I never got out of the boat.

Q. You were knocked down?

A. Yes, sir; I was knocked almost the full length of the boat. [492]

Q. Was anybody else knocked down?

(Testimony of W. Prendegast.)

A. They were all knocked down as far as I could see, the fellows up there.

Q. Where did you go after the collision?

A. I was told to go forward and get a light and to go down into the hold and see if she was taking water.

Q. Did you do that?

A. Yes, sir; I came down off the bridge and went forward and got a lantern.

Q. That was immediately, was it?

A. It was not a very long time.

Q. About what angle did the "Beaver" hit you?

A. Well, I guess she hit us at about an angle of 45 degrees, or something of that kind.

Q. Did you see the injuries to the bow of your vessel afterwards?

A. Yes, we all went up and took a look at it afterwards.

Q. Was there any injury on the starboard bow side?

A. No, The stem seemed to be knocked right over to the port side.

Q. How about the anchor on the port side?

A. I don't remember.

Q. You don't remember that? A. No.

Cross-examination.

Mr. CAMPBELL.—Q. When you went forward and got the light, did you go to the lamp-locker for it?

A. Yes, sir.

Q. The lamp-locker is located right under the

(Testimony of W. Prendegast.)

after end of the forecastle-head on the starboard side? A. Yes, sir.

Q. And you got a lantern there? A. Yes, sir.

Q. And you went into the forecastle then?

A. No, we went down one of the hatches. There was one of the hatches off. We had left it off. [493]

Q. Did not a man go down there with you?

A. Yes, sir; but we did not go down through the forecastle.

Q. Did anybody go down through the forecastle that you know of?

A. Well, Horton said he went down there right immediately; he told me he went down there but he is not the man who was with me.

Q. Through what hatch did you go down?

A. This one right here.

Q. One of the main hatches of the vessel?

A. Yes, sir; there was one of them off here.

Q. It is shown on Exhibit "E."

A. There was one of the hatches off right here, somewhere along there, and we went down on that side.

Q. Did you know a sailor on board by the name of Gannon? A. Yes, sir.

Q. Wasn't he the one that went down with you?

A. I don't remember.

Q. You were not on the lookout at the time of this collision, were you? A. No, sir.

Q. You were working in a boat?

A. I was washing it out. We were getting ready to paint it.

(Testimony of W. Prendegast.)

Q. On the starboard side? A. Yes, sir.

Q. Aft of the bridge? A. Yes, sir.

Q. What were you doing on the inside of that boat? A. Washing it out.

Q. With a scrubbing-brush?

A. No, I had a swab or a rag.

Q. Were you down on your knees?

A. Well, either that or sitting on one of the crosses.

Q. Busily engaged in your work? A. Yes, sir.

Q. That boat you say is about 20 feet aft of the bridge?

A. Yes, about that, I should judge; the position I was in the [494] boat would be about that; the boat almost extends up maybe 10 feet.

Q. What was it that first attracted your attention to the "Beaver," the passing whistle that was given by your vessel?

A. Yes, sir; I believe that is what called my attention to it.

Q. And you then thought that she was two points on your starboard bow?

A. About; I should judge about that. She was well on the starboard side.

Q. How far do you think she would have passed you to starboard if there had been no change in the course of either vessel— $\frac{1}{2}$ mile?

A. Well, between $\frac{1}{4}$ and $\frac{1}{2}$ a mile, or somewhere about that.

Q. Would you say it would be as much as $\frac{1}{2}$ a mile? A. No, I don't think so.

(Testimony of W. Prendegast.)

Q. What would be your judgment of the mate's estimate of $\frac{3}{4}$ of a mile? He might be as nearly right as you are, might he not.

A. I don't think he could see that far.

Q. You don't think you could see that far?

A. No.

Q. But you would not say that the mate was wrong, would you, when he said $\frac{3}{4}$ of a mile?

Mr. DENMAN.—I submit that what the witness' opinion of the mate's testimony is is not competent evidence.

The COURT.—That is true. He may give his own estimate but he is not called upon to pass judgment on anybody else's.

Mr. CAMPBELL.—Q. Don't you think that it might have been as much as $\frac{3}{4}$ of a mile?

A. No, I don't think so.

Q. How far ahead of you do you think she was at the time you saw her? Would you think that was $\frac{3}{4}$ of a mile? A. No, I don't think so.

Q. Do you think it was a half a mile that she was ahead of you?

A. It might have been between $\frac{1}{4}$ and $\frac{1}{2}$ a mile.
[495]

Q. It might have been between a quarter and a half mile?

A. Yes, sir; it might have been that, but it could not have been $\frac{3}{4}$ of a mile, I don't think because I don't think you could see that far at that time.

Q. But you would place it between $\frac{1}{4}$ and $\frac{1}{2}$ a

(Testimony of W. Prendegast.)

mile ahead of you and you think she would have passed from $\frac{1}{4}$ to $\frac{1}{2}$ mile to your starboard if there had been no change in the course of either vessel?

A. She would have passed well to starboard all right.

Q. That is about the distance you would give us, as your judgment? A. Yes, sir.

Mr. DENMAN.—Q. Distance ahead or distance to one side?

A. She was not lying straight ahead of us.

Mr. CAMPBELL.—Q. I understand. You say about 2 points on your starboard bow and about between $\frac{1}{4}$ and $\frac{1}{2}$ a mile ahead. I ask you now if your estimate of the distance she would have passed you off is also between $\frac{1}{4}$ and $\frac{1}{2}$ a mile, or would it have been any more than that?

A. No, it would not have been any more because if both maintained their course they would not get any further apart.

Q. You heard two whistles blown by your vessel, you say? A. Yes, sir.

Q. And did you hear the answer from the "Beaver"? A. No, sir, I did not.

Q. You did not. Did you repeat your two whistles? Did your vessel repeat your two whistles? A. Twice?

Q. Yes.

A. No, they only blew the two whistles once.

Q. They only blew the two whistles once?

A. Yes, sir.

Q. When there was no response came from the

(Testimony of W. Prendegast.)

“Beaver” in answer to the two whistles blown by your vessel did your vessel blow [496] the danger signal of four whistles?

A. No, I don't think she did; no, she did not blow that.

Q. You have no recollection of that?

A. I never heard only three whistles; the captain did that.

Q. Did you hear anybody call from the forecandle-head to the bridge that they could see steam coming out of the whistle but could not hear the whistle of the “Beaver”? Did you hear that?

A. No, I was the man that made that remark myself.

Q. You are the man who made that remark?

A. Yes, sir.

Q. To whom?

A. To the mate. She was not far off then.

Q. You are the man who made that remark?

A. Yes, sir.

Q. And what you said was, “My God! There is nothing but water coming out of her whistles”; is that the remark? A. Yes, sir.

Q. Do you think that a sailor on board the “Necanicum” sitting in a poker game in the forecandle could hear you say that to the mate?

A. I don't think so.

Q. How far is it from the bridge of your vessel to the forecandle of the “Necanicum”?

A. From the bridge?

Q. Yes.

(Testimony of W. Prendegast.)

A. Oh, I guess it is 50 or 60 feet.

Q. Then you and the sailors on board this vessel must have discussed this case afterwards, did you?

A. We have talked it over; yes.

Q. And discussed the whistles and the signals that were given? A. Well, in a general way, yes.

Q. How long had you been on the vessel at that time?

A. I think I went on her in June; I think some time in June.

Q. How long had Gannon been a sailor on that vessel?

A. I don't know; he was on there when I came on.

Q. You knew him pretty well, didn't you. [497]

A. I have been on with him on other boats before. I have been on two other different boats with him.

Q. So you are very well acquainted with him?

A. Well, I know him for 4 or 5 years.

Q. Then it is not a fact that you were standing on the hatches when you called out "My God! There is nothing but water coming out of her whistles"?

A. No, sir.

Q. You were not standing on the hatches just outside of the forecastle? A. No, sir.

Q. Did you know about this card game that was going on in the forecastle at that time?

A. Yes, I knew about it.

Q. Had you been down there?

A. Not since one o'clock, it was going on one o'clock when I went on watch.

Q. As I recall your testimony, your attention was

(Testimony of W. Prendegast.)

called to the "Beaver" by the two passing whistles your steamer blew? A. Yes, sir.

Q. How soon after the two passing whistles were blown did your mate give the order to put the helm to starboard—was it immediately?

A. Well, I suppose almost immediately.

Q. As a matter of fact it was immediately, was it not?

A. I suppose that is the order he would have to give for it to go that way.

Q. When you first saw the "Beaver" you did not see the master around the bridge, did you?

A. Who?

Q. Captain Keegan? A. No, I did not.

Q. It was not until sometime afterwards that you saw the captain?

A. Oh, it was a very short time.

Q. But it was after you had blown the two whistles that you saw the captain?

A. That is when I first saw him, he immediately rushed forward from wherever he was to the bridge.

[498]

Q. Was it not some time after the two whistles were blown before he came forward to the bridge?

A. No, it was a very short time.

Q. When he came forward to the bridge you say you heard him ask the mate what?

A. "What is that fellow doing" or "what is he doing," or something like that.

Q. He asked that of the mate? A. Yes, sir.

Q. Don't you know at that time that the mate

(Testimony of W. Prendegast.)

was over on the port side, the after quarter-deck of that vessel?

Mr. DENMAN.—At what time?

Mr. CAMPBELL.—At the time the master came on the bridge.

Q. Don't you know that? A. No, sir.

Q. You don't know that? A. No, sir.

Q. But you heard the master give the order "hard aport," you heard him give the hard aport order?

A. I believe that is the first order he gave.

Q. The first order that he gave?

A. I believe the first order that he gave. He immediately took charge of the vessel.

Mr. DENMAN.—Q. You mean by "he" the captain?

A. Yes, sir.

Mr. CAMPBELL.—Q. And the first order that was given was hard aport of his helm?

A. Yes, sir.

Mr. DENMAN.—The first order that was given by the captain.

Mr. CAMPBELL.—Yes, we are speaking of the captain.

Q. And that was after he had this conversation with the mate of the vessel? A. Yes, sir.

Q. And thereupon he blew one whistle, did he not, when he gave the order to hard aport the helm?

A. I don't think so.

Q. What whistle do you usually give when you port your helm? [499] What is the port passing whistle? A. One whistle.

(Testimony of W. Prendegast.)

Mr. DENMAN.—The testimony is that he did not port his helm, that it was hard aport.

Mr. CAMPBELL.—Well, hard aport.

Q. Is not that the passing whistle you give?

A. Yes, sir.

Q. Haven't you any recollection as to whether he blew that on passing whistle, or not?

A. No, I have not.

Q. And thereafter you say that three whistles were blown? A. Yes, sir.

Q. On your vessel? A. Yes, sir.

Q. Did you hear three whistles from the "Beaver"? A. No, sir.

Q. You never heard them?

A. The only whistle was—and then it was not exactly a whistle—was the one whistle, and then I exclaimed to the mate, "My God! They could not have blown the whistles; look at the steam flying out of her." It was a very faint blast.

Q. And that was in answer to the two passing whistles given by your vessel?

A. That is the signal he should have given.

Q. The whistle you saw—the sputtering water—was the one given by the "Beaver" in answer to your two whistles?

A. I suppose so. That is the only one I saw, or the only one I heard.

Q. Was it immediately afterwards? Was it immediately after you gave your two whistles that you saw this? A. I could not say.

Q. What is your recollection about it? Do you

(Testimony of W. Prendegast.)

think it was immediately afterwards? Was it when you were looking at the "Beaver"?

A. Yes, sir; I stood up in the life-boat.

Q. Did you stand up in the life-boat and look at the "Beaver" the moment you blew the two whistles?

A. Yes,—I don't know that it was the two whistles—I think the mate—before he blew the two whistles he sent this man up on the lookout, quite awhile before that, and he kept walking up and down rapidly on the bridge and saying, "Can you hear anything—can you hear anything"? to the fellow on the fore-castle-head. [500]

Q. And what did he keep saying?

A. No; he said, "We must be near them." We had seen this boat ahead. The fog had raised and then came down all at once.

Q. At what angle did you see her ahead, how many points?

A. Well, about two points, I should think.

Q. On your starboard bow? A. Yes, sir.

Q. How far distant?

A. Well, about a quarter of a mile, I should judge, or something around there.

Q. When you first saw her, I am talking about.

The COURT.—Q. Do you mean when the fog lifted?

A. Oh, no, when we first saw her, we didn't know what boat it was then. That was around one o'clock. I seen the boat ahead then. Evidently, it was the "Beaver."

Mr. CAMPBELL.—Q. Around two o'clock, or one

(Testimony of W. Prendegast.)

o'clock? A. Around one o'clock.

Q. And how far ahead was she then?

A. She was quite a ways off.

Q. Aren't you mistaken in your time, wasn't it two o'clock?

A. No. It was not foggy at one o'clock. I did not come on deck until one o'clock.

Q. You came on deck at one o'clock?

A. At one o'clock.

Q. And you saw the "Beaver" immediately after you came on deck? A. I saw a boat ahead.

Q. It turned out afterwards to be the "Beaver"?

A. I suppose so. When the fog came down, he told Chris to go up on the lookout; and I said to him, "It is my lookout—" like that.

Q. He said, "I want you to get that boat ready." He said, "The fog may rise again soon." He said, "We will let him go up on the lookout." So I didn't say no more.

Q. When you saw this sputtering of water from the "Beaver's" whistle, then, was it immediately after the two whistles were [501] blown by your vessel?

A. Well, it was not long after, it was not very long.

Q. What period of time would you fix it at, a minute or a half a minute?

A. No, it was not that length of time. It could not have been very long, because from the first time we saw her until she hit us I don't think could have been over two minutes.

Q. Did you see water sputtering out of her whistle?

(Testimony of W. Prendegast.)

A. Water and steam. It looked like water and steam.

Q. When you use the word "water," do you mean you actually saw water?

A. Well, yes. A whistle that ain't been used will fill up with water and steam. When a whistle ain't being used—any whistle, you try it right away, you use it right away, water and steam will come first before any sound.

Q. Has that been your experience on the "Necanicum"?

A. Well, no, not exactly with the "Necanicum," but I have noticed it on all vessels.

Q. What has been your experience with the "Necanicum" in that particular?

A. Well, I never used the whistle on the "Necanicum" only a few times.

Q. On board the "Necanicum" have you ever seen an attempt to blow the whistle when it was filled with water and it would not blow?

A. Yes, sir; I have seen it.

Q. How long does the whistle on the "Necanicum" have to remain without blowing before it fills up with water?

A. Quite a while, I would suppose.

Q. How long would you say?

A. As soon as it gets cold—it has to get heated up before you get any sound out of it.

Q. If the whistle was being blown for fog signals right along, it would not have water in it, would it?

A. No.

Q. Do you know anything about the trap arrange-

(Testimony of W. Prendegast.)

ment on these [502] whistles for the taking off of water so it will not get in the whistle?

A. No, I do not.

Q. You never heard of that, did you? A. No.

Q. Is it not a fact you are rather calling on your imagination when you say you could see water coming out of the "Beaver's" whistle?

A. No, I don't think so.

Q. Then you must have been very close to the "Beaver" at that time, were you not, in order to see water coming out of the "Beaver's" whistle?

A. We were not far off.

Q. You must have been close to her to see water sputtering out of her whistle.

A. It did not take long for him to hit us, it was not long—

Q. (Intg.) Just answer my question. You have stated positively now that you saw water sputtering out of the "Beaver's" whistle. A. Yes, sir.

Q. What was the condition of the weather at that time—was there fog in the air?

A. Yes, sir; it was foggy then for I should judge about half an hour.

Q. Then you must have been very close to the "Beaver" to have seen water sputtering out of her whistle, were you not?

A. Well, we were almost up to her then at that time.

Q. You were almost up to her then at that time?

A. Yes, sir.

Q. And on which side of the "Beaver" did you see

(Testimony of W. Prendegast.)

this water, on her port side or on her starboard side?

A. On her port side.

Q. Then when you saw this water sputtering out of the "Beaver" she must have been changing her course?

A. She was going right across our bow.

Q. She must have been changing her course prior to that time, then?

A. She seemed to be swinging all the time. She must immediately have put her wheel hard over, because she kept [503] swinging all the time. I thought she was going to hit us about amidships.

Q. When you were a quarter to half a mile distant from her, how soon did she begin to swing after you first saw her?

A. Well, she seemed to start to swing almost immediately.

Q. When you saw her, she was swinging, was she?

A. No, I don't think so; I don't think she was swinging then.

Q. Instantly after you saw her she was swinging?

A. Instantly almost she started to cut across our bow.

Q. Instantly after you looked at her the first time, did she start to swing at that moment?

A. She seemed to be swinging; yes, sir.

Q. Was that at the time you saw her blow the one blast that sputtered, or was it after that?

A. It was after that.

Q. It was after that? A. Yes, sir.

Q. You had not seen any steam come out of the

(Testimony of W. Prendegast.)

“Beaver’s” whistle in answer to your two passing whistles prior to the time that the “Beaver” changed her course?

A. I heard no whistle at all.

Q. I know you said you heard no whistle at all on the “Beaver”; I say that the “Beaver” must have changed her course, according to your statement, before you saw any steam come out of her whistle at all. A. She must have; yes.

Q. Did you hear the mate of your vessel blow the danger whistle when he saw the “Beaver” had changed her course, and attempted to cut across the course of the “Necanicum” without responding to her two passing whistles?

Mr. DENMAN.—What do you mean by the danger signal?

Mr. CAMPBELL.—Four whistles. You know what it is.

Mr. DENMAN.—Thank you.

A. No, sir, I said before I heard no whistles at all but that one. That is the only one [504] I seen the “Beaver” give.

Q. You had seen the “Beaver” change her course to cut across your bow before you made this remark to the mate of the vessel, about the water coming out of the “Beaver’s” whistle? A. Yes, sir.

Q. And the mate was on the bridge at that time, was he not?

A. Yes, sir; he was on the bridge.

Q. And it was after that time that the master came on the bridge, was it not? A. No.

(Testimony of W. Prendegast.)

Q. It was not after that time? A. No.

Q. When did the master come on the bridge with respect to that time?

A. He was on the bridge then at that time.

Q. He was on the bridge at that time?

A. Yes, sir.

Q. How long was it after you first saw the "Beaver" that you saw this water sputtering out of her whistle? A. About a minute, I should judge.

Q. About a minute? A. Yes, sir.

Q. And how far distant was she then?

A. She was not very far off.

Q. She was not very far off? A. No.

Q. Now, I understood you to say that you do not recall whether your vessel vibrated, or not, after the three whistles were blown by your vessel.

A. I could feel the vibration.

Q. You could feel the vibration? A. Yes, sir.

Q. And was it after that you saw this water coming out of the "Beaver's" whistle?

A. What do you mean by that?

Q. When you felt the vibration of your engines, was that after you saw this water coming out of the "Beaver's" whistle and you made that remark to the mate? You felt the vibration after that time, did you? A. No, I could not say.

Q. You could not say? A. No.

Q. Your recollection fails you on that point, does it? You cannot [505] answer the question?

A. No, I could not answer that question.

Q. Where were you at the time the two vessels struck?

(Testimony of W. Prendegast.)

A. I was still in the life-boat. I never got out of the life-boat.

Q. Didn't you know there was going to be a collision? A. Yes, sir.

Q. Didn't you think there was going to be a collision when you saw the "Beaver" first change her course? A. Yes, sir.

Q. And you stayed in this life-boat looking at her all this time, and did not get out of the life-boat?

A. No, sir.

Q. You say you were knocked the full length of the life-boat.

A. Almost, yes, sir. I was shot along the top of the seats on my stomach, like.

Q. On your stomach, like? A. Yes, sir.

Q. Now, let us take the life-boat on the port side—on the starboard side; where were you, on the front end or on the back end?

A. On the back end. There was another fellow in the front end helping me, but he jumped out.

Q. You were at the back end of the life-boat?

A. Yes, sir.

Q. How many seats were there athwartships?

A. I don't know; three or four.

Q. And how far were those seats across the keelson of the boat?

A. I don't know, but I guess about ten inches.

Q. And you were in back of the last seat working?

A. Yes, sir.

Q. And you were thrown to the forward end of the boat and over those seats? A. Yes, sir.

(Testimony of W. Predegast.)

Redirect Examination.

Mr. DENMAN.—Q. What will the “Beaver” make through the water when she is going full speed, do you know?

Mr. CAMPBELL.—Q. Have you ever been on board the “Beaver”?

A. No. I worked her along shore. I have been on board of her working along shore. [506]

Q. Have you ever been on board of her and timed her to know what her speed was? A. No.

Mr. DENMAN.—Q. Have you ever seen her going through the water?

A. Yes, sir, I have seen her lots of times.

Q. She is a pretty fast vessel, is she not?

A. Yes, sir, she is a pretty fast vessel.

Q. Makes 15 knots going full speed?

A. Oh, yes, she will do that, I guess.

Q. I want to get at this question of one o'clock and 2 o'clock; could you have seen the “Beaver” at one o'clock if she were approaching you at a 15-knot rate?

A. Yes.

Q. How long would that be? How many miles off would that be?

A. She would be 15 miles at that rate, if she was making 15 knots an hour.

Q. What time do you fix as the time of the collision? Do you recall it?

A. Around 2 o'clock sometime.

Q. And you think it was about one hour before that you saw the “Beaver” in the distance?

A. I saw some boat.

(Testimony of W. Prendegast.)

Q. Might not that have been half an hour?

A. I don't know that it could have been half an hour. All I had to do after one o'clock was to go up and get a pail and get my water and get up on the bridge—up in this life-boat.

Q. Would you fix the time positively at an hour or would you say it was sometime between half an hour and an hour, or how would you treat it?

A. It was sometime after one o'clock that I got up to the bridge, or up in the life-boat, that I noticed it.

Q. Is it possible that you talked over this story of seeing the water in the whistle—first, I will ask you, what was the name of the old man Mr. Campbell mentioned? A. Gannon. [507]

Q. (Continuing:) With Gannon, some time after the collision, when he came out of the forecastle and you came forward? Is it not possible you made the same remark then that you had made to the mate?

A. I might have made some remark about the whistle or the water. I might have made some remark to that effect.

Q. You have spoken of that several times since, have you not?

A. Oh, I talked it over lots of times.

Q. And this conversation with Gannon might have taken place alongside the hatches, might it not?

A. It might have. Gannon was not on deck when the collision happened. Of course, they all came out of the forecastle—some of them did not come out until afterwards. I don't know whether he was in the forecastle, or not.

(Testimony of W. Prendegast.)

Q. But he might have been there when you came forward at that time?

A. He was out. Everybody was out by that time because they all scrambled out as quick as they could.

Q. Who was Horton? Was he the winch-tender?

A. He was the winch-driver.

Q. What was the interval of time, if you recall it, between the starboard and the hard aport order? How quickly was the course there changed?

A. Oh, it was not long.

Q. 30 seconds, as much as that?

A. Well, it might have been that long, but I hardly think it could have been any longer because the captain rushed up on the bridge as soon as the two whistles were blown. Where he was at that time I do not know but I seen him rush up on to the bridge then.

Q. When two vessels are ordinarily passing at sea is the order that is given "starboard" or "hard astarboard"?

A. To starboard or port, or whichever way you are going. [508]

Q. And one whistle is blown for that?

A. Yes, sir; to go to starboard.

Q. That is, where the boat you mean turns to starboard? A. Yes, sir.

Q. How soon after the hard aport signal was given, or the hard aport order was given were the three whistles blown? A. I believe almost immediately.

Recross-examination.

Mr. CAMPBELL.—Q. When the hard aport order

(Testimony of W. Prendegast.)

came that you have just mentioned, the "Beaver" was still on your starboard bow, was she?

A. No, she seemed to be going—well, you might call it on the starboard too, she was still to that side of us but she was coming over; she seemed to be swinging all the time; she kept coming toward us. I thought she was going to hit us about amidships. That is why I stayed in the life-boat.

Q. And you thought she was going to hit you abaft of your stem? A. Yes, sir.

Q. Then, at the time of the hard aport order given to your vessel the "Beaver" must have been on your starboard side at that time?

A. Yes, I guess she was.

Q. Don't guess at it. What is your recollection? At the time your master ordered the helm hard aport, so as to swing your vessel to starboard, was the "Beaver" still on your starboard hand?

A. Well, I could not say, but she must have been.

Q. Then he gave the order to the helmsman to turn the head of your vessel toward the "Beaver," did he?

A. Well, I suppose he was trying to get out of the road if he could; I suppose that is what they were both trying to do.

Q. He gave an order then to the helmsman of your vessel [509] which would turn the head of your vessel towards the "Beaver"?

A. Well, I am not a navigator, I don't know what his object was.

Q. I am asking you for a physical fact; I am asking you for what he did.

(Testimony of W. Prendegast.)

Mr. DENMAN.—The physical fact is the order he gave, not the intent or the purpose of the order.

Mr. CAMPBELL.—Q. The effect of the hard aport order to your quartermaster was to swing the head or bow of the “Necanicum” toward the “Beaver,” was it?

The COURT.—Manifestly, if she were on the starboard side.

Mr. CAMPBELL.—Q. (Continuing.) Can you recall?

A. Now, what is the question? Get it so I can understand it.

Mr. CAMPBELL.—We will withdraw the question. That is all.

Mr. DENMAN.—Q. The “Beaver” never went across your bow and came back again, did she, before hitting you? A. No.

Q. She was on the starboard side all the time up to the time she hit you then?

A. She must have been.

Q. You could see her if she crossed your bow, could you not? A. Yes, sir.

(An adjournment was thereupon taken until tomorrow, Wednesday, October 21, 1914, at 10 A. M.)

[Endorsed]: Filed Jul. 19, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [510]

*In the District Court of the United States, for the
Northern District of California, First Division.*

Before Hon. M. T. DOOLING, Judge.

No. 15,513.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY (a Corporation),

vs.

The Steam Schooner "NECANICUM," Her Tackle,
Apparel, etc.

No. 15,675.

LEGGETT STEAMSHIP COMPANY (a Corpora-
tion),

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY (a Corporation),

Wednesday, October 21st, 1914.

Testimony of E. G. Clough, for Claimant.

E. G. CLOUGH, called for the claimant, sworn.

Mr. DENMAN.—Q. Mr. Clough, what is your oc-
cupation? A. Marine engineer.

Q. How long have you been a marine engineer?

A. About 30 years.

Q. On this coast? A. Yes, sir.

Q. What papers do you hold?

A. Chief engineer of ocean steamers.

Q. Were you on the steamer "Necanicum" at the
time of the collision between her and the "Beaver"?

A. Yes, sir.

Q. What position did you hold on the "Necani-

(Testimony of E. G. Clough.)

cum"? A. Assistant engineer.

Q. Where were you at the time of the collision—on watch? A. On watch; yes, sir.

Q. Did you receive any bells at any time prior to the collision? A. No, sir.

Q. Did you receive any orders of any kind prior to the collision regarding your engines? A. No, sir.

[511]

Q. Now, understand me, I am speaking—well, within five minutes of the collision, did you receive any orders affecting your engines? A. No, sir.

Q. Did you do anything to your engines affecting your engines? A. No, sir.

Q. Do you understand me, Mr. Clough? Did you do anything to your engines prior to the collision? Were your engines reversed prior to the collision?

A. Before the collision?

Q. "Prior"—I guess you don't understand the word. Did you get any orders from the bridge before the two vessels came together?

A. Yes, sir; I got "Full speed astern."

Q. What time did you get that?

A. 2:16 in the afternoon.

Q. How long was that before the collision?

A. That was about two minutes.

Q. About two minutes before the collision?

A. Yes, sir.

Q. Had you had any orders prior to that time?

A. No, sir.

Q. What did you do when you got the order?

A. I reversed the engine full speed astern.

(Testimony of E. G. Clough.)

Q. What sort of reversing gear have you?

A. Steam reversing gear.

Q. How long does it take you to get the engines over?

A. Oh, about probably a little over a second, or two seconds.

Q. Did you reverse them? A. Yes, sir.

Q. What happened after you had reversed the engines? How long was it before the vessels struck?

A. About two minutes.

Q. Where were you during that time?

A. Right at the throttle.

Q. What happened when she struck?

A. Well, it threw me down when she struck.

Q. What do you mean by throwing you down?

A. The impact, the jar.

Q. In what direction did you fall?

A. I fell forward. [512]

Q. Did it throw you against the engine?

A. No, sir; it threw me right forward, in the fire-room.

Q. You answered here right along that you made no changes or got no orders prior to the collision. What did you mean by that?

A. Well, I thought you wanted to know whether I got any orders half an hour or more before the collision, or something like that.

Q. You mean, then, prior to the time around the collision? A. Yes.

Q. And all those continuous answers of *no had* reference—

(Testimony of E. G. Clough.)

Mr. CAMPBELL.—Let the witness testify, Mr. Denman.

Mr. DENMAN.—Well, it was so clearly a discrepancy—

Mr. CAMPBELL.—Well, if it was, the record shows it.

Mr. DENMAN.—Take the witness.

Cross-examination.

Mr. CAMPBELL.—Q. What is the matter that has been erased on this page detailing the circumstances of the collision?

A. Well, I didn't have room enough there. The chief came down afterwards and told me, after I had written it out there, I didn't have room enough, and I had better put it out there, and then I discovered that I had the collision before the full speed astern, so I erased it out there and put it over there and made it out that way.

Q. That is what you had on here before?

A. Yes, sir.

Q. You had what before you had the collision?

A. I had the collision in front, on top there first; I discovered that after I had written it down, and the chief came down and told me I had better put it out there, I had more room and it would look better.

Q. When did you write this up—after the collision? A. Yes, sir.

Q. When did the chief see it, and when was the change made?

A. After we got under way and were bound for San Francisco, shortly [513] afterwards.

(Testimony of E. G. Clough.)

A. How long afterwards?

A. Probably half an hour.

Q. Half an hour?

A. Maybe not that.

Q. Where is the original log in which you make your entries in the engine-room? This is not the engine-room log.

A. Yes, that is the engine-room log.

Q. This is the log as it is kept in permanent form, is it not?

A. The chief engineer copies from that on to the engine sheet which is sent to the office. That is the engine-room log. It is always kept there.

Q. Don't you have a scratch log which you use for putting down the time of your bells?

A. We have a tab; yes, sir.

Q. Where is that memorandum?

Q. That is on the engine-room bench.

Q. Where is the memorandum you made up that day, at the time of the collision?

A. I don't know where that is.

Q. Didn't you preserve it? A. No, sir.

Q. You wrote this up from that memorandum, did you not?

A. No, I wrote that up from that I knew about it at the time.

Q. Is it not customary on your vessel to have a pad or a blackboard, or a slate alongside of the throttle, or immediately back of the throttle on which you record the bells you receive?

A. I keep them in my head and I go right to the

(Testimony of E. G. Clough.)

log and put them down. We have a tab there that we figure up the revolutions on.

Q. Where did you keep this log?

A. On the engine-room bench.

Q. Do you step to the engine-room bench and make the entry in this log originally? A. Yes, sir.

Q. When you receive the bell? A. I do.

Q. What is the pad that you spoke of a moment ago?

A. The pad for figuring out the revolutions registered, the revolutions from watch to watch. [514]

Q. Were you ever in a steamer before where the original slate or blackboard or log on which the bells were recorded was the one in which the revolutions were also recorded in their columns? A. Yes, sir.

Q. Is it not customary on all steamers—

A. (Intg.) No, sir.

Q. What is not customary?

A. To have a log slate to put it down.

Q. Is it not customary on all steamers to have a slate or a tab or a blackboard handy so that the hour and the minute of an order may be recorded by the engineer the moment he executes it, and looks at the clock, and from that board the transcription takes place to a permanent log, from which the chief engineer makes his copy? A. No, sir.

Q. Whereabouts is the bench located with respect to your throttles?

A. I guess it is about 10 or 12 feet.

Q. On which side, on the same side as your throttles?

(Testimony of E. G. Clough.)

A. Well, it is running across the ship.

Q. Forward or aft of the engine?

A. Aft of the engine.

Q. And fastened to a bulkhead? A. Yes, sir.

Q. Then, when you were working your vessel, in order to record the orders you receive, you leave your throttle every time and go back to this bench 12 or 12 feet and record them down in this book?

A. Yes, sir.

Q. You do that? A. Yes, sir.

Q. Have you ever seen that done on any other vessel than your own? A. Yes, sir.

Q. Don't you keep on board your vessel a book or a pad or a blackboard in which you record instantly that the orders are given to you, a record similar to this record?

A. No, sir. We have a log-book there. Some of them have a log slate; some of them have their desk right opposite the throttle, or within two or three [515] feet, and a log-slate put on that, and all the incidents and everything like that are put right down on the slate, and then it is copied off on a log sheet in the chief's room. The slate is taken up to the chief's room at the end of the voyage or trip.

Q. Who makes out the log sheet which goes to the owners—the man on watch or the chief engineer?

A. The chief engineer. He takes the log-book up to his room and copies it out.

Q. Haven't you on board of your vessel a small blackboard, or a slate, or a book in which you or the

(Testimony of E. G. Clough.)

chief engineer writes the entries that you have executed, and in accordance with the orders you receive?

A. No, sir. That is the engine-room log.

The COURT.—Those are the original and the first entries?

A. Yes, sir. It takes the place of a slate or a tab. It is afterwards copied on to a regular sheet and sent to the office at the end of a trip.

Mr. CAMPBELL.—Q. How far from the forward end of your engine is the throttle?

A. From the forward end of the engine?

Q. Yes.

A. Oh, I should judge it is about eight inches; it is right on the forward end of the engine.

Q. Your throttle is not at the side. Have you a triple expansion engine?

A. No, sir; a compound.

Q. A fore and aft compound? A. Yes, sir.

Q. Where are your links? Are they on the forward end or back end of the engine?

A. The forward and the back ends of the engine.

Q. And your throttle is right in front of the links?

A. Yes, sir; right almost in front of the high-pressure link.

Q. How far is that from the fireroom bulkhead?

A. About 14 feet, or 15 feet, or something like that.

Q. And you were thrown into the fireroom by the collision? A. Yes, sir. [516]

Q. And you were thrown over 14 feet forward?

A. Oh, no; the fireroom practically is where the oil goes into the burners. The bulkhead is back of

(Testimony of E. G. Clough.)

the boiler. The boiler is something like 10 feet long.

Q. Is there not a bulkhead separating your engine-room from your fire hole?

A. No, it is all open.

Q. It is all open. A. Yes, sir.

Q. How far were you thrown?

A. I was thrown about 5 feet, I suppose, or something like that.

Q. It might have been more than that—as much as 10? A. No, sir.

Q. You would not say it was any more than 5 feet?

A. No, sir.

Q. That is your judgment now? A. Yes, sir.

Q. You never got an order to stop your engine, did you? A. No, sir.

Q. After the collision? A. No, sir.

Q. The first order you got was from full speed astern to full speed ahead? A. Yes, sir.

Q. And you continued that full speed ahead on until you got to San Francisco?

A. No, we were running half speed for a while.

Q. According to your log, here, you went full speed astern at 2:16? A. Yes, sir.

Q. And you went full speed ahead at 2:20?

A. Yes, sir.

Q. And you continued that full speed ahead until at 6:35 you got a stop order? A. Yes, sir.

Q. So you never received an order from your bridge to stop your engine?

A. Well, I don't remember that; I was not on watch at that time.

(Testimony of E. G. Clough.)

Q. But it would be in the log, would it not?

A. It was not on my watch.

Q. You didn't on your watch?

A. No, sir. [517]

Q. What do you burn on board that vessel?

A. We burn oil.

Q. Where are your fuel oil tanks?

A. Aft both sides, port and starboard side.

Q. Where do you fill those tanks for the round voyage?

A. Whatever port we are in; at San Pedro we fill them up.

Q. On this voyage where did you fill them?

A. San Pedro.

Q. Where were you bound for? A. Eureka.

Q. Where were you going to return from Eureka?

A. San Pedro.

Q. So at the time of the collision, your tanks were more than half full of oil, were they?

A. Yes, sir, I should judge they were.

Q. What size tanks are those?

A. I could not say.

Q. Oh, you have been an engineer long enough to know the size of those oil tanks?

A. I didn't pay any attention to that.

Q. Of what capacity?

A. They hold 610 or 620 barrels.

Q. Each, or together? A. Together.

Q. 300 barrels each. Can't give us the dimensions of those tanks?

A. I suppose about very near 6 by 15 or 16 feet

(Testimony of E. G. Clough.)

long; something like that.

Q. What beam, what width?

A. About 5½ feet, or 6 or something like that.

Mr. CAMPBELL.—I offer this log-book in evidence as part of the cross-examination, the engineer's log-book.

Mr. DENMAN.—We have no objection.

(The document was here marked "Libelant's Exhibit 12.")

Mr. CAMPBELL.—That is all.

Redirect Examination.

Mr. DENMAN.—Q. When you say that you had the collision before the bell for full speed astern, do you mean to say you had the time of the collision before, or simply the place on [518] the book before the full speed astern bell? Did you have the time of the collision?

A. I had the collision before the full speed astern.

Q. I know that, but did you have the time of the collision, or simply the place, in the column?

A. I had the collision at 2:18 in the column there "Remarks" instead of "Full speed astern," which I ought to have had. That is the first bell I received, the full speed astern, at 2:16. I ought to have put that above that.

Q. In other words, you describe yourself going full speed astern two minutes after the collision?

A. Yes, sir.

Q. And you changed it around so as to make it two minutes before the collision? A. Yes, sir.

Q. Who called your attention to that?

(Testimony of E. G. Clough.)

Q. But it would be in the log, would it not?

A. It was not on my watch.

Q. You didn't on your watch?

A. No, sir. [517]

Q. What do you burn on board that vessel?

A. We burn oil.

Q. Where are your fuel oil tanks?

A. Aft both sides, port and starboard side.

Q. Where do you fill those tanks for the round voyage?

A. Whatever port we are in; at San Pedro we fill them up.

Q. On this voyage where did you fill them?

A. San Pedro.

Q. Where were you bound for? A. Eureka.

Q. Where were you going to return from Eureka?

A. San Pedro.

Q. So at the time of the collision, your tanks were more than half full of oil, were they?

A. Yes, sir, I should judge they were.

Q. What size tanks are those?

A. I could not say.

Q. Oh, you have been an engineer long enough to know the size of those oil tanks?

A. I didn't pay any attention to that.

Q. Of what capacity?

A. They hold 610 or 620 barrels.

Q. Each, or together? A. Together.

Q. 300 barrels each. Can't give us the dimensions of those tanks?

A. I suppose about very near 6 by 15 or 16 feet

(Testimony of E. G. Clough.)

long; something like that.

Q. What beam, what width?

A. About 5½ feet, or 6 or something like that.

Mr. CAMPBELL.—I offer this log-book in evidence as part of the cross-examination, the engineer's log-book.

Mr. DENMAN.—We have no objection.

(The document was here marked "Libelant's Exhibit 12.")

Mr. CAMPBELL.—That is all.

Redirect Examination.

Mr. DENMAN.—Q. When you say that you had the collision before the bell for full speed astern, do you mean to say you had the time of the collision before, or simply the place on [518] the book before the full speed astern bell? Did you have the time of the collision?

A. I had the collision before the full speed astern.

Q. I know that, but did you have the time of the collision, or simply the place, in the column?

A. I had the collision at 2:18 in the column there "Remarks" instead of "Full speed astern," which I ought to have had. That is the first bell I received, the full speed astern, at 2:16. I ought to have put that above that.

Q. In other words, you describe yourself going full speed astern two minutes after the collision?

A. Yes, sir.

Q. And you changed it around so as to make it two minutes before the collision? A. Yes, sir.

Q. Who called your attention to that?

(Testimony of E. G. Clough.)

A. The chief engineer.

Q. When did he call your attention to that?

A. Shortly after the collision.

Q. What was the fact? Did you get full speed astern bell two minutes after the collision?

A. After the collision?

Q. Yes? A. No, sir.

Q. What was the actual occurrence then?

A. I got a full speed astern two minutes before the collision.

Q. How do you come to fix the period of two minutes? A. By figuring nearest to the minute.

Q. Nearest to the minute? A. Yes, sir.

Q. Do you recall whether it was more than two minutes or less than two minutes?

A. If it was a minute and three-quarters, I would call it two minutes.

Q. Suppose it were a minute and a half, what would you call it?

A. I would call it a minute and a half.

Q. Suppose it were a minute? You would, of course, leave it [519] at that. Suppose it were a minute and fifteen seconds?

A. It would be about a minute and a half, or a minute, or something like that.

Q. That is to say, you would be indifferent as between them?

A. Yes, sir, as between the two.

Q. How many pounds of steam did you have on that day? A. 150 pounds.

Q. I want you to look at this again and tell me

(Testimony of E. G. Clough.)

whether or not it is not a fact that that original entry as you made it there was not "Full speed astern at 2:16," and that the inversion that was made was the inversion of the position and not of the time?

Mr. CAMPBELL.—I think the witness can testify independently of that.

Mr. DENMAN.—It is his own handwriting on the book, there, and I am going to hand it to the Judge in a moment.

Mr. CAMPBELL.—Q. Mr. Clough, have you an independent recollection of what was recorded there?

A. Have I what?

Q. Have you an independent recollection of that? Can you tell us what you had there without looking at the book?

A. That is what I put down.

Q. You understand Mr. Denman's questions to you a moment ago as to what you had written first, did you not? A. Yes, sir.

The COURT.—The witness stated—I don't know whether anybody heard him but the Court—that in the original entry he had the collision occurring at 2:18.

Mr. CAMPBELL.—He just stated, in answer to Mr. Denman's questions, as I understood it, and I think that is the way Mr. Denman now understands it, that he had the collision at 2:16 and the reversing at 2:18. [520]

The COURT.—But Mr. Denman then followed that up with a question "Did you have the full speed astern two minutes after the collision," and to which

(Testimony of E. G. Clough.)

he said yes. But previously to that he had said that in his original entry he had recorded the collision at 2:18. The record will show that. I don't know whether either of you observed it.

Mr. CAMPBELL.—I had the same idea of it that Mr. Denman had.

The COURT.—But this was another and subsequent statement I am now referring to.

Mr. CAMPBELL.—But I object now, your Honor, to the witness referring to this log unless it appears that it is necessary for him to refer to it.

The COURT.—Q. Just close the book for a minute, Mr. Clough. Can you tell us what your original entries were before you changed them?

A. The original entry was that the collision was supposed to be at 2:18.

Q. I am not talking what it was supposed to be, but what did the entry state?

A. 2:18; that the collision was at 2:18.

Q. What did the original entry state the receipt of the bell? A. 2:16.

Q. But in the order of the entry, you had the collision in the book first? A. Yes, sir.

The COURT.—I understood him to state that at one time.

Mr. CAMPBELL.—I may have made the same error that apparently Mr. Denman did. I did not understand it that way.

Mr. DENMAN.—If the Court please, while we are on this, I would like to have your Honor look at the entries, and I think you will see that the statement

(Testimony of E. G. Clough.)

of the witness is borne out.

The COURT.—I will look at it.

Mr. DENMAN.—Q. This is your handwriting, is it not, Mr. [521] Clough? A. Yes, sir.

Q. I wish you would take this magnifying glass and read from here what the first entry was at 2:18, if you can, and what the second was at 2:16?

A. I cannot see it here.

Q. You can take it over to the light, over to the window. A. I can't see that.

Q. Take the one at 2:16: Do you see the word "astern" before 2:16, the second entry?

A. Yes, I see that, yes.

Q. Do you see the word "at" before 2:18?

A. Yes, I see that.

Q. Had you written before that, in collision at 2:18?

Mr. CAMPBELL.—Now, Mr. Denman, let the witness bring out the facts. He said a moment ago he couldn't read it. You are just putting the testimony into his mouth.

Mr. DENMAN.—I admit I am putting words in his mouth. He has it near the light now.

A. Oh, I can read, at 2:18. I can read, "At 2:16." I can see the "astern".

Q. The "astern" is just before the "2:16"?

A. Yes, sir. I know. I put the collision down at 2:18 before.

Recross-examination.

Mr. CAMPBELL.—Q. I understood you to say, in answer to Mr. Denman's question, that if an order

(Testimony of E. G. Clough.)

came on the half minute, you would record it on the half minute? A. Yes, sir.

Q. If it came on the quarter minute, would you record it as half? A. As half or to the minute.

Q. Supposing the time was two minutes and thirty-five seconds, would you record it as three minutes, or as two and a half minutes?

A. That would be on the half, the minute and a half.

Q. I want you to show me on your log-book here where you have recorded any half minutes? Will you look at this log-book and show me where you have recorded any half minutes during your watch? Even back as far as October 21: "Slow at 2:52; ahd full 3:04; "Slow ahd 4:20; ahd full 4:22; Stop 5:06; Ahd full 5:10." Can you find me any entries in the log there where you have recorded half minutes?

A. I don't now whether I could, or not.

Q. Wouldn't it be a very peculiar coincidence if all of the [522] orders which you received when you were on watch were right on the even minute? It would be a remarkable coincidence, would it not?

A. Well, not exactly.

Q. Isn't it your recollection at this time that you do not record half minutes?

A. Well, to be exact, sometimes I do, but we put it near the minute.

Q. I am asking you now as a matter of record; When you go to make your record in this book, have you any recollection that you record your orders in half minutes? A. Sometimes I do.

(Testimony of E. G. Clough.)

Q. Can you show me in this book any place where you have done so?

A. I don't know that I can show you in that book, there might be other books though.

Q. Would it not be a very peculiar coincidence if all the orders that you received while you were on watch during the period that this book was in use, that your orders came on the minute?

A. Yes, sir; it would.

Mr. DENMAN.—Q. You never have contended, have you, that all your orders came on the minute?

A. No.

Q. I understand your testimony to be that where it is important you note a half minute, and on the other occasions you put it to the nearest minute?

A. Yes, sir.

Mr. CAMPBELL,—Mr. Denman, I seriously object to your leading the witness in that way.

Mr. DENMAN.—Q. The practice, as shown by this log, is to take the nearest minute, is it not?

A. Yes, sir. I have put it down say 15½ or 20½, to be exact; I have put that down in logs at times.

Mr. CAMPBELL.—Q. Can you remember an instance when you did that? Can you recall now an occasion when you did that?

A. I cannot recall the time, or probably the date, in 35 years or 30 years of experience; no, sir.

The COURT.—Do you recall any occasion that would call for such accuracy, without reference to date or time? [523]

A. Well, I would not say for sure. At the time

(Testimony of E. G. Clough.)

when I was on the "Roanoke" we had a collision in the bay, and I was on watch at the time, I think it put it down on the half minute, the bells that were received at that time.

Mr. CAMPBELL.—Q. How many years ago was that?

A. Well, that is about four years ago. In my time I have put it down on the half minute to be exact, but not on the quarter. [524]

Testimony of Charlie Ottenhauser, for Claimant.

CHARLIE OTTENHAUSER, called for the claimant, sworn.

Mr. DENMAN.—Q. What is your business?

A. Sailor.

Q. How long have you been a sailor?

A. 14 years.

Q. On this coast?

A. No; in deep water most of the time.

Q. How long have you been on this coast?

A. About five years.

Q. Were you on the schooner "Necanicum" on the day of her collision with the "Beaver"?

A. Yes, sir.

Q. Whereabouts were you?

A. I was standing on deck.

Q. On which side of the deck?

A. The starboard side.

Q. What was the condition of the weather on that afternoon, at the time of the collision?

A. It was foggy.

(Testimony of Charlie Ottenhauser.)

Q. Did you see the "Beaver" at any time before she hit you?

A. I seen her when it was clear, about around noontime.

Q. Noontime.

A. Yes, sir; somewheres around there; I don't remember what time that was, but I remember seeing her.

Q. How long before the collision was that?

A. Oh, that was about an hour before the collision anyway; I could not say the correct time.

Q. It was some time, some considerable time?

A. Yes, sir.

Q. Might it have been half an hour?

A. It might have been half and it might have been an hour; I could not say what time.

Q. What happened after you saw her with reference to weather conditions? A. It got foggy.

Q. Did she disappear?

A. She disappeared out of sight; yes, sir.

Q. How soon before the collision did you see her?

A. You mean—

Q. (Intg.) I mean just before the collision, how soon did you see her?

A. Well, about a minute, or half a minute, before [525] the collision.

Q. What called your attention to her?

A. Well, I was looking for her; I was watching for her, that is why.

Q. Were there any whistles from your boat?

A. There were two whistles.

(Testimony of Charlie Ottenhauser.)

Q. How soon after the two whistles were blown did you see her?

A. Oh, about half a minute or so, I guess; I don't know. I never kept track of it and I don't remember. It was not very long, that is all I know.

Q. Where did you see her when you first saw her immediately before the collision?

A. I seen her on the starboard side.

Q. Whereabouts on the starboard side?

A. Ahead of us.

Q. How many points on your starboard bow?

A. Oh, I should judge about 2 points. It must have been all of that; I could not see a ship, I don't think a person could see a ship a point ahead from where I was standing.

Q. Where were you standing?

A. I was standing amidships. I could not look over the forecastle-head.

Q. You said just now that when you first saw her you were standing on the starboard side of the ship?

A. Yes, sir.

Q. And this is the second time you saw her that you were standing amidships; is that right?

A. Well, I saw her on the starboard side of the hatch.

Q. Of the hatch?

A. That would be on the starboard side, between the hatch-coamings and the waterway.

Q. What happened after you saw her 2 points on your starboard bow, just before the collision?

A. Well, she kept turning.

(Testimony of Charlie Ottenhauser.)

Q. Did she strike you? A. Yes, sir.

Q. Whereabouts did she strike you?

A. Right on the stem.

Q. Did you examine the injuries afterwards?

[526]

A. No, sir; I did not. Oh, I did about an hour or so afterwards. I never went on the forecastle-head then.

Q. Did you notice whether she had any injuries on her starboard side?

A. No, I did not notice that. All I know is that the anchor pipe was broke.

Q. On which side? A. On the port side.

Q. How far off did she seem to be when you saw her before the collision the first time?

A. Oh, it was not any more than a quarter of a mile.

Q. Who was on the lookout? A. Chris.

Q. What is his last name?

A. I don't know his last name.

Q. Who was on the bridge?

A. The mate; it was the mate's watch.

Q. Was that Beckwith? A. Yes, sir.

Cross-examination.

Mr. CAMPBELL.—Q. You saw the "Beaver" two different times?

A. Yes, sir.

Q. How long before the collision was the first time?

A. Oh, as I said, I could not tell exactly how long;

(Testimony of Charlie Ottenhauser.)

it was right after I came up from my dinner.

Q. Right after you came up from your dinner; what time do you have dinner? A. Half-past 12.

Q. What time? A. Half-past 12.

Q. Where did she bear then; right ahead?

A. Yes, sir; a little to the starboard.

Q. A little to the starboard? A. Yes, sir.

Q. Could you tell at that time, or could you estimate at that time how far off to your starboard she was going to pass if both vessels held their courses?

A. If both held their courses they ought to pass I should judge about 2 points. [527]

Q. And how far distant? A mile off would they pass? Would she pass a mile in sight of you?

A. Oh, no; not that much; about $\frac{1}{2}$ a mile, I should think.

Q. About $\frac{1}{2}$ a mile? A. Yes.

Q. The next time that you saw her you think she was within a quarter of a mile of you? A. Yes, sir.

Q. And about 2 points on your starboard bow then? A. Yes, sir.

Q. And how much on your starboard bow was she when you first saw her—about 2 points?

A. You mean at the time it was clear?

Q. When you came up from dinner.

A. Oh, I should judge about 2 points.

Q. So she had not widened any on your starboard bow from the time you first saw her and until you saw her the second time? A. No.

Q. What were you doing on deck during all that time?

(Testimony of Charlie Ottenhauser.)

A. I was not doing anything. It was my watch below.

Q. It was your watch below? A. Yes, sir.

Q. Was it foggy? A. Yes, sir.

Q. What were you doing standing out there on the deck in foggy weather? Were you maintaining a watch?

A. No, it was just because I heard the mate ask Chris if he could hear any whistles. He asked him two or three times and I just naturally came out like a fellow would going to sea so long, he pays attention to those things.

Q. Did Chris on the forecastle-head say he could not hear any whistle?

A. He could not hear any whistles; that is what I heard him say.

Q. Didn't you know there was a card game going on in the forecastle?

A. Yes, I knew there was a card game going on.

Q. But you preferred to stand out where it was cold and foggy rather than staying inside, although you had nothing to do? [528] A. Yes, sir.

Redirect-examination.

Mr. DENMAN.—Q. How long had that card game been going on on that ship?

A. Well, I don't know. I had a watch on deck until 12 o'clock. I don't know how long it had been going on before that; I could not tell you.

Q. Is not that really a perpetual card game up there in the forecastle?

A. Oh, we used to play poker pretty often, yes.

(Testimony of Charlie Ottenhauser.)

Q. Had you been in that game that afternoon?

A. No, I had not been in that day, but I was a steady poker player myself.

Q. Is that the customary way of relieving the tiredness of a journey when you are off watch?

A. Yes, sir.

Q. Have you got what is called a telescopic eye?

A. Well, that is something I don't know what it means.

Q. Could you tell what course the "Beaver" had accurately if you saw her 10 or 15 miles away, could you tell the course she was on if you simply saw her 10 or 15 miles away?

A. Well, I could in a way; if she was heading down the coast and we were going the opposite way I could tell.

Q. Well, all you can say, is it, when you saw her the first time, is that she was heading down the coast?

A. Yes, sir.

Q. You would not pretend to say that—

Mr. CAMPBELL.—I object to that form of question, Mr. Denman, as a leading question.

Mr. DENMAN.—Well, it is pretty hard to get at a man's mental capacity.

Q. When you are off watch do you steadily stay in the fore-castle, or do you move in and out?

A. Oh, I move in and out like anybody else would, unless I turn in and go to sleep. [529]

The COURT.—I don't know whether you gentlemen heard this answer, or not, but the witness, it seems to me, said he came out at this time because

(Testimony of Charlie Ottenhauser.)

being long at sea, and he heard the mate inquire of the lookout if he could hear any bell, and that that brought him out.

Mr. DENMAN.—Any whistle.

Mr. CAMPBELL.—I didn't hear that answer, your Honor.

The COURT.—Well, that is what he said.

(The record was here repeated by the reporter).

Mr. CAMPBELL.—Q. Then you were not out on deck only just a moment before you saw the "Beaver"?

A. Oh, I was not steady on deck from the time of my watch below; no, sir.

Q. Where were you when you came out, when you heard the mate call to Chris—were you there in the forecastle where the card game was?

A. I was there, yes.

Q. What whistle did you hear blown by the "Beaver"?

A. I heard her blow one whistle after the "Necanicum" blowed two.

Q. Did you hear the "Beaver" blow three whistles?

A. I don't remember that. I remember I heard her blow one whistle. I paid attention to it because the "Necanicum" blowed two whistles and she only blowed one. That called my attention.

Q. Did you see the "Beaver" at that time?

A. No, sir; that was before I saw the "Beaver."

Q. As I understand it, you heard the "Beaver's" one whistle before you saw her at all.

(Testimony of Charlie Ottenhauser.)

A. Yes, sir.

Q. And how long was it—was it $\frac{1}{2}$ a minute before?

A. Just about $\frac{1}{2}$ a minute; I could not exactly say.

Mr. DENMAN.—Q. What did you do when you heard this whistle? Did you step to the side, or what?

A. I stepped up on the waterway; the waterway is about 8 inches higher than the deck. [530]

Q. Is that when you first saw the “Beaver,” when you stepped on the waterway?

A. It was after she blew the one whistle I seen her. I didn’t see her before she blew it.

Q. Now, the question is, was it any great length of time after she blew the one whistle that you saw her loom in the fog?

A. No, it was not any great length of time. I could not tell exactly what it was; it was a little space of time.

Q. What was the condition of the sea on that day?

A. It was calm.

Q. How were the waves?

A. Oh, well, just a little swell; that is all.

Testimony of G. W. Slater, for Claimant.

G. W. SLATER, called for the claimant, sworn.

Mr. DENMAN.—Q. What is your name?

A. G. W. Slater.

Q. Mr. Slater, what is your occupation?

A. Marine engineer.

Q. How long have you been marine engineer?

(Testimony of G. W. Slater.)

A. Five years.

Q. What papers do you hold?

A. Chief of ocean.

Q. Were you on the steamer "Necanicum" at the time of her collision with the "Beaver"? A. Yes.

Q. Is that a photograph of the "Necanicum," Claimant's Exhibit "F"?

A. It is a photograph of the "Necanicum."

Q. I will ask you whether or not the bridge deck is in the same condition was or was in the same condition at the time this photograph was taken that it was at the time of the collision.

A. The bridge itself?

Q. The bridge deck and the structures on it.

A. No.

Q. What changes have been made?

A. Well, they have put a house up above the wheel-house, on top of the bridge since that time. This house that you see behind, just at the back of the pilot-house has been put on. That awning extended at that time [531] right straight across, just the same height as the windows are.

Mr. CAMPBELL.—Q. Partially covered the bridge, and it was an open bridge?

A. It was an open bridge at that time or it is partially covered; the bridge they did not cut off, it is the same length.

Mr. DENMAN.—Q. How about the captain's room?

A. The captain's room has been put on since the collision, but it has not been shown here.

(Testimony of G. W. Slater.)

Q. That is abaft that bridge-house you are speaking of, is it not? A. Yes.

Q. This canvas that appears here you say extended clear out to the end?

A. Yes, the same as it is now. This used to be canvas there, now it is wood. They cut the canvas off and connected it on to the house on either side.

Q. At that time there was a canvas across?

A. Across there.

Q. Extending up between 4 and 5 feet?

A. Just the same as it shows there, just exactly as it is there; that extended straight across, that is canvas here.

Q. So that from side to side in the front of the bridge-deck there was a canvas structure about between 4 and 5 feet high?

A. Yes, came up to about here (illustrating).

Q. Where were you at the time of the collision with the "Beaver"? A. I was in the forecastle.

Q. In the forecastle? A. Yes.

Q. What can you say as to the force of the shock?

A. Well, it was an awful shock.

Q. What happened?

A. What do you mean,—to the ship?

Q. No, we will say to the persons that were in the forecastle?

A. It knocked me down, I can say that.

Q. Did it knock anybody else down?

A. Yes, it did. It knocked [532] the fellows down in the forecastle that were in there. It knocked me down and I was picking myself up, I could not

(Testimony of G. W. Slater.)

say who else was knocked down; they were all scrambling all around there.

Q. Where did you go after the collision?

A. I went right back in the engine-room.

Q. When you went back to the engine-room did you have any discussion thereafter with Mr. Clough regarding the log entries? A. I did.

Q. How long was that after the collision?

A. I should think maybe 3 minutes, 3 or 4 minutes, something like that,—it was just after, I could not say just exactly how long it was, right after the collision.

Q. After the entries were made did you have any discussion with him?

A. Yes, he was just writing it down and that is the time I had the discussion with him.

Q. He was writing it down?

A. He was just putting it down.

Q. What was that discussion?

A. I told him that he had—he was putting down the time of the bells in the Remarks column, in the space left for the remarks, and I told him that should have been left for the remarks as to the collision and for him to put the time of the bells out on the other side.

Q. What about the order in which the bells were entered?

A. He had down the collision first—he first was putting in collision with the “Beaver” and then was putting the bells down and I told him he had it wrong, he had it down wrong. “Well,” he says, “I

(Testimony of G. W. Slater.)

will change it then." I said, "Put it down in the order it came," so he rubbed it out and changed it.

Q. How long was the "Necanicum" going astern prior to the collision? A. Well, 2 minutes. [533]

Q. I am not asking for any record now, I am asking for your memory of it?

A. Of my own memory I could not swear, but it was somewhere in that neighborhood.

Q. How much steam pressure did you have on that day? A. 150 pounds.

Q. Do you know what speed that will develop on her?

A. Why, about 8; maybe a little better. 8 knots, maybe a little better than that.

Q. What is the maximum amount of steam that you carry? A. 160.

Mr. DENMAN.—Take the witness.

Cross-examination.

Mr. CAMPBELL.—Q. What were you doing in the forecastle?

A. I was talking to the winch-driver, Mr. Horton.

Q. Where were you standing with respect to the door that led out on to the main deck?

A. Well, I was standing at that time—I could not see out of the door at that time. I was right in front of the anchor-chain that comes down through there.

Q. How far from the door would you say that you were? A. 10 feet.

Q. What is that?

(Testimony of G. W. Slater.)

A. About 10 feet; that is approximately. I do not say exactly.

Q. How far were you thrown by the collision?

A. About 4 feet, until I fetched up against the anchor-chain.

Q. Now, around the side of the forecastle you have these dead-lights, circular dead-lights which are shown on Claimant's Exhibit "D," have you not?

A. What is that?

Q. You have the dead-lights in the forecastle?

A. Yes.

Q. Those are what light the forecastle?

A. Yes.

Q. And they are on both sides?

A. They are on both sides and over the top bunk, and you would have to climb up and look through the bunks to see out. [534]

Q. You keep these open, do you?

A. I don't know whether they do; I have seen them open and I have seen them closed.

Q. Now, you and the winch-driver were watching this card-game, were you not? A. Yes.

Q. And you stood within 10 feet of the door that led out on deck? A. Yes.

Q. The door you can see under the forecastle-head?

A. Yes.

Q. On the port side?

A. The door is on the port side, but I was just about amidships.

Q. I show you "Libelant's Exhibit 2" attached to

(Testimony of G. W. Slater.)

the deposition of either Mr. Beckwith or Mr. Gannon, Mr. Olson, or Captain Keegan, which was drawn by one of the sailors to show the arrangement of the forecastle. I want you to look at it.

Mr. DENMAN.—That is not in evidence, Mr. Campbell.

Mr. CAMPBELL.—No, but I will offer it in evidence.

Q. Can you show me on that drawing about where you stood, and mark it with the letter "F"?

A. I don't think that is right.

Q. You don't think it is right?

A. No, I will tell you why—

Q. Then let us have your own, which you think is right, a hasty sketch of it.

A. Now, there is really the way that is, because here is the door in the forecastle.

Q. Let us mark this door. Did I correctly mark it?

A. Yes, that is right. That is the door of the sailors' forecastle.

Q. Mark with an X where you were standing.

A. Right here (indicating). The anchor-chain is down here.

Q. The little square that is just abaft of where you were standing was the table where the card-game was going on?

A. Yes. That other sketch is all right, only there is a little bit [535] of a locker here, and that is in the center of the ship.

(Testimony of G. W. Slater.)

Mr. CAMPBELL.—I offer that in evidence.

(The paper is marked “Libelant’s exhibit 13.”)

Q. Now, did you hear the mate of your vessel calling out to the lookout on the forecastle-head inquiring as to whether he could see the “Beaver”?

A. Not that I remember; no.

Q. Did you see a sailor named Ottenhauser leave the forecastle to go out on deck? A. Yes.

Q. Where was Ottenhauser standing with respect to your position? A. I don’t remember.

Q. Did you hear any conversation at all between the forecastle and the bridge?

A. I heard them shouting out there but I don’t know what they said. I paid no attention to it.

Q. You did not pay any attention to it? A. No.

Q. Did you hear your vessel give two whistles?

A. I did.

Q. You stood there and continued to watch the card-game? A. Yes.

Q. Did you hear your vessel give three whistles?

A. I don’t remember that I did.

Q. Will you swear that you did not?

A. No, I would not swear that I did.

Q. You won’t swear that you did? A. No.

Q. Did you feel your vessel reverse? A. Yes.

Q. You felt your vessel reverse? A. Yes.

Q. And you as chief engineer of that vessel continued then to watch that card game? A. Yes.

Q. And you waited watching that card game until the collision came and you were knocked to the floor?

(Testimony of G. W. Slater.)

A. Yes.

Q. Was not that very strange conduct on your part? A. I don't know; I was off watch.

Q. Off watch? A. Yes. [536]

Q. When you heard your vessel give two whistles you understood them to be a passing whistle, did you? A. I supposed it was, yes.

Q. That is what you took them to be? A. Yes.

Q. And when you felt the vibration of your engines reversing your vessel you knew that you were trying to stop her, didn't you? A. Yes.

Q. Did you know it was foggy at that time?

A. Yes.

Q. Didn't you think that you as an engineer of 25 years' experience, your conduct was most unusual to remain in the forecastle watching a card game under those circumstances? A. No.

Q. You don't? A. No.

Q. Where was your post of duty in the case of an emergency?

A. Where is my post of duty in case of an emergency?

Q. Where was your post of duty on board that ship in the case of an emergency?

A. In the engine-room.

Q. Didn't you know when two passing whistles were given by your vessel followed by a reversing of your engines that an emergency existed?

A. No.

Q. What did you think existed?

A. Well, that happens every time mostly.

(Testimony of G. W. Slater.)

Q. It happens mostly every time?

A. Pretty nearly always they try to stop the boat if they hear a whistle in the fog. If you kept running in the engine-room every time they reversed the engine in the fog you would be running down there all the time.

Q. Were you ever on any vessel running up and down this coast where they stopped and reversed the engines when they heard a fog signal?

A. No, I never was.

Q. This was a great exception to the rule, on the "Necanicum"? [537]

A. I really think so. I have been on those that have—

Q. You heard—

Mr. DENMAN.—(Intg.) Let him finish his answer.

A. (Continuing.) But not to the extent that this boat keeps stopping all the time.

Mr. CAMPBELL.—Q. Do you know what the rule of navigation is with respect to stopping the engines in case of fog?

A. No.

Q. Did you say that it was the uniform practice on the "Necanicum" to always reverse the engines when they heard a fog-whistle of another vessel?

A. Not always reverse the engines, but they would invariably stop.

Q. Stop the engine? A. Yes.

Q. But you did not feel any stopping of your engine, did you? A. She went back.

(Testimony of G. W. Slater.)

Q. Then this was an unusual circumstance, was it not?

A. Well, I guess possibly so, yes—no, it is not. We have done that lots of times.

Q. Didn't you consider it this day in foggy weather, after a two-blast passing whistle had been given, a most unusual circumstance that your vessel should reverse full speed astern?

A. No, I did not pay any attention to it at all.

Q. You didn't pay any attention to it? A. No.

Q. You did not consider an emergency existed which called you to your post of duty?

A. No. If I had I would have gone down.

Q. After the collision you rushed to the engine-room? A. I certainly did.

Q. And the first thing you looked for was the log?

A. No. To see if she was leaking.

Q. What is that?

A. I went down to see if the ship was making water. [538]

Q. Then the next thing you looked at was to see if you had a proper log entry?

A. No, I went back up and reported to the bridge that she was all right. Then I went back down there and saw Mr. Clough—

Q. What is that?

A. Then I went back down in the engine-room and saw Mr. Clough writing in the log there and I looked over and I told him he had it wrong, he should leave that out in the remarks column.

(Testimony of G. W. Slater.)

Q. It took more than 3 minutes to do that, didn't it? A. No.

Q. Do you think that only 3 minutes elapsed from the time you were knocked down, picked yourself up, went down to the engine-room to ascertain whether she was making water and went to the bridge to report and then back to the engine-room to look at the log?

A. I don't think 3 minutes elapsed; I don't think it was more than 2 minutes after the collision.

Q. Haven't you the usual tube communication from the engine-room to the bridge? A. Yes.

Q. Why didn't you whistle up the tube and report whether she was making water?

A. I could step up that ladder about 3 steps and put my head out of the door and holler up quicker.

Q. You did not go to the bridge then?

A. I did not go up to the bridge, I went up and reported to the bridge.

Q. That she was making no water? A. Yes.

Q. What was the condition of the engine when you went into the engine-room?

A. The engine was running, but I could not say whether she was running ahead or astern.

Q. What condition was it in when you went back the second time? A. She was turning over.

Q. Turning over? A. Yes. [539]

Q. Now, you said that your maximum steam pressure on the vessel was 160 pounds? A. Yes.

Q. I want you to look at your log and tell me what the customary steam pressure is that you carry on

(Testimony of G. W. Slater.)

that vessel. When you mention your maximum pressure was 160 pounds, do you mean that her safety valve is set to blow off at 160?

A. That is what she blows off at; yes.

Q. I want you to look through from the time that you left San Pedro on October 26th up to the time of the collision and tell me what steam pressure you were carrying right along.

A. Well, I was carrying 150.

Q. Right along, were you not?

A. Yes. You see we log 150 pounds there; we give the fireman when we are running along 3 or 4 pounds to go by, that is all; it is logged that way.

Q. That is the steam pressure under which you run your vessel day in and day out, 150 pounds?

A. Yes, in a fog.

Q. Did you have foggy weather from San Pedro all the way up the coast?

A. Not all the time, but it was foggy.

Q. Show me in your book here where you had more than 150 pounds pressure during the time it was not foggy? A. I do not say we did.

Q. Why did you say a moment ago that you carry 150 pounds because it was foggy?

A. We never carry over 150 pounds customarily in a fog.

Q. Customarily or not customarily do you carry more than 150 pounds?

A. If it is nice clear weather and no prospects of fog, we do—at that time when Captain Keegan was on it we did carry more at some times.

(Testimony of G. W. Slater.)

Q. Show me on that log on that voyage where there is an entry of more than 150 pounds of steam?

A. I possibly cannot; if [540] there is no entry of over 150 we did not carry over 150. I can show it to you further along in the book—

Q. You record in that—

Mr. DENMAN.—(Intg.) Let him finish. What can you show further along in the book?

A. Where we carried 155.

Mr. CAMPBELL.—Q. Do you record in your engine-room log the time when it is foggy and not foggy?

A. No, not always.

Q. What is the thickness of the steel of the plate out of which your oil-tanks are made?

A. I don't know.

Q. Don't you know? A. I don't know about it.

Q. What is your judgment of the thickness of the plate in those oil-tanks? A. I don't know.

Q. What does it weigh to the square foot?

A. That I could not say.

Q. How long were you chief engineer of this vessel? A. Since it was built.

Q. As chief engineer?

A. Not chief in her; I went chief of the boat in June last.

Q. Haven't you learned during that period of time the thickness of the plates of your oil-tanks?

A. No; I never saw the oil-tanks out until day before yesterday.

(Testimony of G. W. Slater.)

Q. Are not the oil-tanks made to lap?

A. How is that?

Q. Don't your plates lap? A. Yes.

Q. Where they are riveted together? A. Yes.

Q. Haven't you observed the thickness of the plates?

A. No, because I could not get in to see them.

Q. What thickness of plates are oil-tanks of that size usually made of? A. Half-inch.

Q. Is that about what you think this plating is?

A. Possibly it is; it may possibly be a little thicker, I don't think it is, [541]

Q. What is that?

A. I don't think it is any thicker; I think it is about $\frac{1}{2}$ an inch.

Q. You don't think it would be any thinner than that? A. I do not.

Redirect Examination.

Mr. DENMAN.—Mr. Slater, there are some questions I failed to ask you on direct examination: Q. Have you been present at the making of any experiments with the "Necanicum" in the Bay of San Francisco recently? A. Yes.

Q. On Wednesday of last week, was it?

A. Tuesday we went out there first—Tuesday, was it not?

Q. Tuesday, yes. A. Tuesday afternoon.

Q. Were you in the engine-room during the making of the experiments? A. Yes.

Q. What can you say as to the amount of steam

(Testimony of G. W. Slater.)

that you had on during the making of the experiments?

Mr. CAMPBELL.—Just a minute. We object to this line of testimony regarding experiments under the rule which forbids its admission in admiralty cases, stating the rule as I recall it, that proof of experiments is not admissible by the party making them unless an invitation is extended to the opposing side to have representatives present.

Mr. DENMAN.—I offer to turn the ship over at any time—at any moment; she is being held here for that purpose. I don't remember of any rule of that kind.

Mr. CAMPBELL.—I would like the record to show my objection, and I think I can support it by authorities.

Mr. DENMAN.—Your Honor will recall, that evidence was put in.

Mr. CAMPBELL.—That evidence was put in after you drew it out yourself. It was not mentioned by me in my direct case. [542] You drew it out in cross-examination, and you demanded the production of the records here. I did not offer it at that time because I was conscious of this rule which I believe exists.

Mr. DENMAN.—I don't know of any such rule. If there is such a rule exists I presume the evidence would be excluded, but we have offered and now offer to turn this vessel over for experiments during the course of this trial; it will not take more than an hour or so. Last week, as soon as we got through the

(Testimony of G. W. Slater.)

experiments and I knew what they were and what the results would be I offered them to counsel.

Mr. CAMPBELL.—You offer them now for the first time. I heard of an experiment the other day. You offered to turn the “Necanicum” over to me if I would turn the “Beaver” over to you.

Mr. DENMAN.—On the contrary, you are mistaken. I offered to turn the “Necanicum” over to you under any circumstances.

Q. Mr. Slater, what was the amount of steam that you had in the engine-room?

Mr. CAMPBELL.—So I shall not interrupt, it may be understood that my objection goes to all this line of testimony?

The COURT.—Yes.

A. What steam we had the other day when we were out?

Mr. DENMAN.—Q. On the bay.

A. 150 pounds.

Q. What was the condition of the vessel with regard to cargo. Did she have any cargo on?

A. At the time of the collision?

Q. At the time of the collision. A. No.

Q. What was her condition at the time of the experiments? A. Just the same, no cargo.

Q. What was the cargo with regard to the amount of oil in the tanks? [543]

A. We had just the same amount of oil in the tanks that we had at the time of the collision.

Q. How did the company get that same amount of oil?

(Testimony of G. W. Slater.)

A. Well, I went in and took that, just that much oil.

Q. Who was present when you took it, or who were present?

A. I don't know whether the first assistant was up there, or not; I took the oil myself.

Q. I mean before the experiments who was present on the boat at the time that the suggestion was made of the amount of oil that you should have?

Mr. CAMPBELL.—So that the record will indicate it, I wish to reserve an exception to the ruling.

Mr. DENMAN.—An exception is not necessary in this court.

A. You were there.

Q. You were bringing it to the same condition under instructions from us, were you not? A. Yes.

Q. Now, can you tell what bells the vessel was going ahead under at the time of these experiments and prior to the giving of reversing signals?

A. She was going full speed ahead.

Q. Was there any difference in the conditions in the engine-room, in the conditions as between the engine-room at that time and at the time of the collision?

A. No, they were just as near the same as it was possible to get.

Q. Were you in the engine-room on the 16th when the second set of experiments were made?

A. Yes.

Q. What was the condition then as to the amount of steam? A. Just the same.

(Testimony of G. W. Slater.)

Q. The same condition in the engine-room?

A. The same condition as the time before, under those instructions to carry the same steam. [544]

Recross-examination.

Mr. CAMPBELL.—Q. You say that you had the same amount of oil in your tanks on the day of this experiment. What day was the first experiment made?

A. On Tuesday.

Q. Tuesday of this last week?

A. Tuesday of last week, Tuesday afternoon, I think it was.

Q. That was before you came out here in attendance upon this case, before you came out to the court for the first time? A. Yes.

Q. And you say that you had the same amount of oil in your tanks on the day of the experiments in San Francisco Bay? A. Yes.

Q. That you had at the time of the collision?

A. As near as it was possible to get; yes.

Q. How many barrels of oil did you have in your tanks at the time of the collision?

A. About 515 barrels.

Q. What is the capacity of those tanks?

A. 308 barrels each, 616 barrels both tanks.

Q. You take fuel at San Pedro for the round voyage? A. Take the tanks full.

Q. How do you know that there were that many barrels of oil in the tanks at the time of the collision? Did you examine it at that time?

A. The tanks were full when we left, 616 barrels,

(Testimony of G. W. Slater.)

and we burned about 49 barrels a day—49 or 50. Now, it might be 49 and it might have been 50, but at that time I looked up the records of the oil, and I found we were burning 50 barrels a day; we had run from San Pedro two days and two hours, I think it was, I figured it out there, down there, I did not bring it up with me.

Q. You figured that on the run from San Pedro to the moment of [545] collision you had consumed your usual and uniform consumption of fuel?

A. Yes. Then I put the same amount in the tanks again.

Q. Who was present during the taking of these experiments? A. Who was present?

Q. Yes.

A. Why, there was Mr. Jones, I think.

Q. Superintending engineer for the owners of this vessel?

A. Yes, and Mr. Burnett, Mr. Denman and Mr. Falls.

Q. How do you spell that name?

A. I don't know. I guess it is F-a-l-l-s. He is the ship's husband.

Q. In the employ of the owners?

A. I think so. And the captain, of course, he was there, and all the crew.

Q. Was Captain Keegan on her at this time?

A. No.

Q. Was mate Beckwith on her? A. No.

Q. Then you made an experiment the second time, you say? A. Went out the second time; yes.

(Testimony of G. W. Slater.)

Q. How many days after the first one?

A. The next day.

Q. And repeated the same experiments?

A. Well, we went out and back. I don't know whether it was the same ones or not; they backed three times the second time they were out.

Q. Had you put the fuel back into the tanks the second time to replace what you had burned the day before? A. We only burned about two barrels.

Q. Did you replace the oil in the tanks?

A. No, I did not replace that.

Q. Who worked the engines during these experiments? A. I did.

Q. You don't know anything about how the engines were worked at the time of the collision, do you?

A. Back full speed, with the pass-over open.

Q. You have no personal knowledge of how they were working [546] excepting what you could tell by the vibration of the ship?

A. They were backing at full speed.

Mr. DENMAN.—He said they were working with the pass-over.

Mr. CAMPBELL.—Q. I say you have no knowledge yourself of how that engine was working at the time of the collision?

A. I have not.

Q. Do you know the tidal conditions that existed on the day of the experiments? A. No.

Q. Where were the experiments made?

A. Out here in the bay.

(Testimony of G. W. Slater.)

Q. In which part of the bay?

A. I could not say; I was not up there watching it. I was down in the engine-room.

Further Redirect Examination.

Mr. DENMAN.—Q. I want you to recall now about the second experiment. You have said that the steam conditions were the same? A. Yes.

Q. Isn't it a fact that there had been a considerable change in the amount of oil? A. Yes.

Q. At the time of the second experiment?

A. Yes.

Mr. CAMPBELL.—I object to the leading question.

Mr. DENMAN.—It appears that the second experiment was made under identical conditions with the first, and I do not want to have it appear, although it is in my favor.

Q. How much of a change in the amount of oil did you have in the vessel at that time?

A. We took out 400 barrels of oil.

Q. At the time of the second experiment?

A. We were 400 barrels lighter; to be exact 407 barrels. [547]

Further Recross-examination.

Mr. CAMPBELL.—Q. Mr. Slater, why didn't you tell me that a moment ago when I was asking you about the oil?

A. Because you did not ask me.

Q. You knew what I was after, didn't you?

A. I did not; no.

(Testimony of G. W. Slater.)

Q. I didn't ask you for the quantity of oil there was in these tanks?

A. No; you asked me if I pumped back the oil that we used, and I said we did not.

Q. You did not understand that I was seeking to know whether you had the same quantity of oil in your tanks on the second experiment as you had on the first?

A. No. I was answering your question.

Q. And restricting your answers as closely as you could to what I was asking? A. Yes.

Q. Why did you take out 400 barrels out of these fuel tanks for that experiment?

A. We did not take it out for the second experiment. We took out 400 barrels to go into the drydock, to lighten the ship, to go into the drydock, and they wanted to go out and try another experiment, and we went over and got up steam and went out.

Q. What was your answer to me,—was it that you pumped back into the tanks the oil that you consumed the day before?

A. No. I said I did not.

Q. What was the answer you made to my first question? What did you understand as my first question?

A. You asked me if I had replaced the oil that we had used the day before in the tanks, and I told you no, we did not.

The COURT.—Q. You were in the engine-room during all of those experiments?

A. I was; yes.

(Testimony of Peter Christensen.)

Q. Did you or did you not obey immediately each bell as you received it? A. We did. [548]

Testimony of Peter Christensen, for Claimant.

PETER CHRISTENSEN, called for the claimant, sworn.

Mr. DENMAN.—Q. Mr. Christensen, what position did you have on the “Necanicum” at the time of the collision? A. Sailor.

Q. Where were you at the time the two vessels came together, whereabouts?

A. At the wheel.

Q. How long had you been at the wheel?

A. I took the wheel at two o’clock.

Q. What whistles did you hear from your boat, if any, prior to the collision?

A. Well, I heard two whistles given by the mate, for to starboard the helm.

Q. Did you starboard the helm? A. Yes.

Q. What happened next?

A. Well, he gave the orders to hard aport.

Q. Did you see Captain Keegan on the deck?

A. No, I could not see him.

Q. Did you hear him?

A. I heard his orders.

Q. What was his order? A. Hard aport.

Q. How soon did the hard aport order come after the starboard order?

A. Well, it was very quick, I had no chance—the boat had no chance to swing, maybe a point and a half or something like that, until the orders was reversed.

Q. Did you put it hard aport? A. Yes.

(Testimony of Peter Christensen.)

Q. Was your vessel reversing at any time?

A. Well, she was reversing when I got the orders to put my wheel hard aport—she was reversed.

Q. How could you tell she was reversed?

A. You could tell that from the motion of the boat.

Q. How long was she reversed before the collision?

A. Well, it is a pretty hard thing to say as a positive fact, but I should judge a minute and a half or two minutes. [549]

Q. Where were you standing, on which side of the wheel-house, during the period she was reversing?

A. On the starboard side.

Q. On the starboard side?

A. Yes, because I was putting my wheel to port.

Q. Because you had to put your wheel to port?

A. Yes.

Q. In putting your wheel to port, which way to the upper spokes of the wheel turn?

A. Toward the starboard side.

Q. At the moment of the collision, you had hold of the wheel?

A. At the moment of the collision, right up to the time she hit.

Q. What happened when she hit?

A. Well, I don't know what happened.

Q. What happened to you, I mean, in the wheel-house?

A. I know I was thrown over to the port side.

Q. How were you thrown over?

A. Well, I don't know whether it was the shock of the wheel, something threw me over.

(Testimony of Peter Christensen.)

Q. Which way did the wheel swing?

A. It swung to the starboard side—that is, it swung starboard to port, the port side, but the old saying is, “Swung to starboard.”

Q. You mean by that that the top of the wheel swung to port and the bottom swung to starboard?

A. What I mean is when the wheel reverses from port, she swings over to the starboard side,—on the port side.

Q. It swung in the opposite direction from what you had been pulling it? A. Yes.

Q. Did it remain that way?

A. No, she came back again.

Q. Before you touched it? A. Yes.

Q. How soon was that?

A. I don't know. I was picking myself up about that time.

Q. Did you see it swing back? A. Yes.

Q. Could there have been any appreciable length of time between [550] the two motions?

A. No, I think it was too quick; it was going too fast.

Q. Too quick for you to appreciate any time?

A. Yes.

Cross-examination.

Mr. CAMPBELL.—Q. What course were you steering by your pilot-house compass before you received any orders to change it?

A. Why, you will have to find that out on my statement; it is a year ago; I have forgotten. My course is on that statement.

(Testimony of Peter Christensen.)

Q. Did you make a statement a year ago?

A. Almost a year ago.

Q. To whom did you give it?

A. I think my statement is here somewhere, it must be.

Q. Did you give it to the owners?

A. I don't know who they were.

Q. Don't you recall the compass course that you were steering?

A. No, not at the present time, because I am steering every day and every hour.

Q. How many times have you been going up and down the coast at the wheel between Point Reyes and Point Arena? A. About five years.

Q. What is the usual course going north from Point Reyes to Point Arena?

A. Well, the exact course, right course, is northwest by south; sometimes we do not do that.

Q. Is it northwest by north, or northwest half west?

A. Northwest by north— $\frac{7}{8}$ ths north is correct by the compass.

Q. That is the pilot-house compass?

A. Pilot-house compass.

Q. Did you record in this statement that you furnished to the owners the compass course that you were steering?

A. I gave them the course that I was steering at that time.

Q. Now, when you received this order to starboard your helm, was that before or after your vessel blew

(Testimony of Peter Christensen.)

two whistles? Did you [551] hear your vessel blow two whistles?

A. Yes, I heard it blowing two whistles.

Q. Was this starboard order, to starboard your helm before or after your whistle or at the same time?

A. At the same time, exactly at the same time.

Q. To what compass point did your vessel swing when you starboarded your helm?

A. Well, she don't swing over—well, as far as I can remember, from a point and a half to two points.

Q. I want the compass points. Didn't she swing to west by south? A. West by south?

Q. Yes. A. She never got that far.

Q. Didn't she swing south of west?

A. Well, I won't swear to the course that I was steering, because I can't tell you.

Q. You appreciate that you are under oath to tell the truth, don't you? A. Yes.

Q. Now, I want it. Didn't your vessel's head swing to south of west when you starboarded your helm?

A. I would not swear to that, because I don't know.

Q. Don't you recall that it did?

A. No, I do not.

Q. Did it swing to west by north?

A. West by north?

Q. Yes.

A. That is something about the course I had before I was swung to starboard.

Q. That was about the course you had before you swung to starboard? A. Yes.

(Testimony of Peter Christensen.)

Q. That was about the course that you had her on when you ported your helm and swung to starboard?

A. I don't quite understand you.

Q. You starboarded your helm when you say these two whistles were given by your vessel?

A. Yes.

Q. And when Mr. Beckwith told you to starboard your helm? A. Yes. [552]

Q. I ask you if your vessel's head, the bow, did not swing around so it was heading almost due west, or a little south of west.

A. I am not sure, I don't know.

Q. Didn't you look at the compass and see what the bearing was at that time?

A. I just glanced at it, that was all.

Q. Don't you remember that you were heading a little south of west at the time that you received the order to hard aport?

A. I remember one thing, that she did not swing over a point and a half, something like that, and that is all I do remember.

Q. Did you look at the compass? A. Yes.

Q. Whereabouts was it located?

A. I tell you, I have forgotten at that time where it was.

Q. Which side of the wheel was the compass on?

A. Which side?

Q. What side of the hub of the wheel?

A. The compass is right in front of the wheel.

Q. Which side did you stand on when you starboarded your helm? A. On the starboard side.

(Testimony of Peter Christensen.)

Q. When you starboarded your helm?

A. On the port side.

Q. When your vessel's head swung around under that starboard helm, didn't you look at the compass at that time? A. I just glanced at it.

Q. What way was she heading at the time you received the order "Hard aport"?

A. I tell you I have forgotten.

Q. Don't you recall that she was heading about due west?

A. Well, that is pretty hard for a man to say, since that length of time, I can't remember.

Q. You would not say she was not, would you?

A. I would not say she was, or I would not say she was.

Q. Now, then, you say you got an order to port your helm? A. Yes.

Q. Who gave that order?

A. Well, I only heard the voice. I had [553] to go by the voice. I think Captain Keegan.

Q. Did you hear a whistle from the "Beaver"?

A. No.

Q. What whistle did you hear from your vessel after you heard the two whistles?

A. Well, I heard whistles, but I did not have no time to count the whistles at that time, because I was porting my helm.

Q. Now, Mr. Christensen, I want to know the whistles that you heard blown from your steamer after the two whistles. What is the next whistle you heard blown by your vessel?

(Testimony of Peter Christensen.)

A. I could not count them, for I was too busy, putting my wheel to port.

Q. Didn't you hear one whistle and know it was one whistle? A. No, I did not.

Q. Didn't Captain Keegan say to you—didn't you talk with Captain Keegan after this collision about his blowing one whistle and about his taking charge of the vessel out of Beckwith's hands? A. No.

Q. Didn't you discuss with him his taking command of that vessel out of Beckwith's hands and ordering the helm hard aport?

A. Please ask me that question again.

Q. Didn't you discuss with Captain Keegan the fact that he took command of the vessel out of Keegan's hands and gave the order "hard aport"?

The COURT.—Out of Beckwith's hands?

Mr. CAMPBELL.—Out of Beckwith's hands, and gave the order "hard aport"? Don't you remember that conversation with Captain Beckwith in which you discussed the one whistle that was given—

Mr. DENMAN.—Captain Keegan, you mean?

Mr. CAMPBELL.—Captain Keegan. Don't you remember the [554] conversation with Captain Keegan in which you discussed his having given one whistle on the "Necanicum's" whistle when he ordered his helm hard aport?

Mr. DENMAN.—Is there any evidence of that? There is no evidence of that in the record.

Mr. CAMPBELL.—There may be before we get through.

Q. Didn't Captain Keegan say to you at that time,

(Testimony of Peter Christensen.)

“My God! Don’t say anything about that”?

A. No.

Q. What is that?

A. I never had any conversation with Keegan that way.

Mr. DENMAN.—The testimony is that he took the command out of the hands of Beckwith.

Mr. CAMPBELL.—Do you remember coming down to my office a week ago? A. Yes.

Q. Do you remember going to the office of the San Francisco & Portland Steamship Company?

A. Yes. I went there for information.

Q. You came there and you told them you wanted to tell about this case, didn’t you? A. Yes.

Q. And Mr. Dean brought you down to my office, didn’t he? A. I don’t know who he was.

Q. Do you remember coming to my office?

A. I do.

Q. Don’t you remember telling me that you wanted to tell the truth about this case, regardless of who it hurt? A. Yes.

Q. Don’t you remember telling me that night, or that afternoon, in the presence of Mr. Dean, that your vessel swung so that she was heading south of west?

A. Well, I am telling you the same here as I told you then.

Q. Don’t you remember telling us that afternoon that your vessel had swung so that she was heading south of west?

A. No, I don’t [555] remember that.

Q. You don’t remember that? A. No.

(Testimony of Peder Christensen.)

Q. Don't you remember telling us that you had talked with Captain Keegan about this collision, and that the collision would not have occurred if he had not taken it out of Beckwith's hands and ordered the helm hard aport and blown the one whistle?

A. No, I don't remember that at all.

Q. You don't remember that? A. No.

Q. Don't you remember saying to us that Captain Keegan had said to you, "My God! Don't say anything about this"? A. No.

Q. You don't remember telling us that?

A. I don't remember that at all.

Q. Don't you remember that when you left the office, that you said that you were going to leave town, and would not testify in this case.

A. I remember saying that I did not want to get into trouble over the case, I wanted to tell the truth.

Q. You wanted to tell the truth. Don't you remember telling us what I have said to you?

A. No.

Q. Why did you go to the office of the San Francisco & Portland Steamship Company, on Market street. Who took you there? Did you go there voluntarily?

A. I don't know how I got there. I went up there, I could not find the other office.

Q. You knew the office you were going to?

A. I didn't know where to go to.

Q. You went to their office, didn't you? You knew that you were going to the San Francisco & Portland Steamship Company's office, didn't you, to talk about

(Testimony of Peter Christensen.)

this case? Wasn't you there, or did you go there alone?

A. There was no one with me there that I know of.

Q. Who went with you?

A. I don't know as anybody went with me. [106]

Q. What was your purpose in going there?

A. As I told you.

Q. To tell the truth about this case? A. Yes.

Q. What was the necessity of your going to that office voluntarily, if you wanted to tell the truth about this case?

A. I don't know, I could not tell you about that either.

Q. Didn't you had a quarrel with the master of that vessel that morning? A. I told you I not.

Q. You had?

A. There was no serious quarrel though.

Q. You told us you had a quarrel with the master of your vessel, didn't you? A. Yes.

Q. That you wanted to tell the truth about this case? A. Yes.

Q. About the collision?

A. Which I am going to do.

Q. Had you ever talked with the man that you saw and came to my office with—had you ever talked with him prior to the day that you went there? A. No.

Q. Had you ever seen him before? A. No.

Q. Had you ever seen me before? A. No.

Q. What was it about the case that you were afraid you could not tell the truth about?

(Testimony of Peter Christensen.)

Q. Don't you remember telling us that you had talked with Captain Keegan about this collision, and that the collision would not have occurred if he had not taken it out of Beckwith's hands and ordered the helm hard aport and blown the one whistle?

A. No, I don't remember that at all.

Q. You don't remember that? A. No.

Q. Don't you remember saying to us that Captain Keegan had said to you, "My God! Don't say anything about this"? A. No.

Q. You don't remember telling us that?

A. I don't remember that at all.

Q. Don't you remember that when you left the office, that you said that you were going to leave town, and would not testify in this case.

A. I remember saying that I did not want to get into trouble over the case, I wanted to tell the truth.

Q. You wanted to tell the truth. Don't you remember telling us what I have said to you?

A. No.

Q. Why did you go to the office of the San Francisco & Portland Steamship Company, on Market street. Who took you there? Did you go there voluntarily?

A. I don't know how I got there. I went up there, I could not find the other office.

Q. You knew the office you were going to?

A. I didn't know where to go to.

Q. You went to their office, didn't you? You knew that you were going to the San Francisco & Portland Steamship Company's office, didn't you, to talk about

(Testimony of Peter Christensen.)

this case? Who took you there, or did you go there alone?

A. There was no one took me there that I know of.

Q. Who sent you there?

A. I don't know as anybody sent me there. [556]

Q. What was your purpose in going there?

A. As I told you.

Q. To tell the truth about this case? A. Yes.

Q. What was the necessity of your going to that office voluntarily, if you wanted to tell the truth about this case?

A. I don't know, I could not tell you about that either.

Q. Hadn't you had a quarrel with the master of that vessel that morning? A. I told you I had.

Q. You had?

A. There was no serious quarrel, though.

Q. You told us you had a quarrel with the master of your vessel, didn't you? A. Yes.

Q. That you wanted to tell the truth about this case? A. Yes.

Q. About the collision?

A. Which I am going to do.

Q. Had you ever talked with the man that you saw and came to my office with—had you ever talked with him prior to the day that you went there? A. No.

Q. Had you ever seen him before? A. No.

Q. Had you ever seen me before? A. No.

Q. What was it about the case that you were afraid you could not tell the truth about?

(Testimony of Peter Christensen.)

A. I don't know as there was anything I was afraid of in particular.

Q. What was the necessity of your coming to the San Francisco & Portland Steamship Company's office and telling them that you wanted to tell the truth about this case?

A. Well, that is a pretty hard thing to say. A man wants to tell the truth whenever he can tell it.

Q. What was there in your mind that you were afraid you could not tell the truth?

A. There was nothing in my mind.

Q. What was the occasion of your coming to the company's office and saying that you wanted to tell the truth about the case?

A. Because I thought you might tell me what to do.
[557]

Q. You thought I might tell you what to do?

A. Yes. What did you tell me?

Q. Is that the reason?

A. What did you tell me?

Q. Is that the reason you came there?

A. What did you tell me?

Q. Is that the reason you came there, because you thought I might tell you what to do?

A. You might advise me.

Q. You were there seeking my advice, were you?

A. Yes. But afterwards I had a right to change my own opinion, hadn't I, of what to do?

Q. Is that what you came there for, to get my advice as to what you should say?

A. No, not what I would say, but what to do.

(Testimony of Peter Christensen.)

Q. Was it necessary to have my advice as to whether or not you should tell the truth in this case, or whether you could tell the truth?

A. Well, I guess we misunderstood one another in that case.

Q. I guess we did. That is all.

Redirect Examination.

Mr. DENMAN.—Most astonishing to me. You had been drinking, had you not, when you had that row with your Captain?

A. I had the morning we had the row, yes.

Q. You were drinking, had been drinking, when you went to the office of the San Francisco & Portland Steamship Company? A. I was not very sober.

Q. You were angry at the captain?

A. I was mad at what he told me, that is all.

Mr. CAMPBELL.—I object to your leading the witness.

Mr. DENMAN.—You brought out something new on cross-examination. I think he is pretty near your own witness.

Q. How did this conversation about your going out of town come [558] up? Who suggested that you should go out of town?

A. Well, I don't know as anybody really suggested it.

Q. How did this going out of town business come along? A. I don't remember how it did come.

Q. Something was said about it, was there, going out of town?

A. Well, I could not tell you, I am sure.

(Testimony of Peter Christensen.)

Q. Do you recall having expressed an opinion to Mr. Campbell or this other gentleman that Captain Keegan should not have taken the command out of Mr. Beckwith's hands?

A. I don't remember saying that. I might have said it.

Q. You had been drinking, you say? A. Yes.

Q. Why didn't you tell me anything about this discussion that you had with my opposing counsel?

A. Well, it was my first experience, I didn't know.

Q. Have you ever to anybody expressed any different statement of facts as to what happened here, as to what happened at the time of the collision than you have given in the record here?

A. You mean in my statement?

Q. Yes; to anyone?

A. No, not any more than on the boat talking with one another.

Q. Have you ever given me any different facts than the facts you have testified to here?

A. No, I never have.

Q. Why didn't you tell me if there was any conversation between yourself and Keegan about "My God! Don't tell that," or was there any such conversation?

A. Not that I can remember of.

Q. Was there anything said on the bridge about "My God! What is that fellow doing?" when they saw the "Beaver" approaching?

A. No, not that I know of.

Q. Did you notice anything of that kind?

(Testimony of Peter Christensen.)

A. No.

Q. Do you remember any "My God" conversation of any kind by [559] anybody?

A. Well, I have heard it said amongst the sailors, yes.

Q. I mean in reference to the collision here?

A. I never heard it.

Q. Have you seen Captain Keegan recently?

A. I never have seen him since the day I left the boat, and that is a week before Christmas, last Christmas.

Q. Are you by the ship now?

A. I was by till last Tuesday morning.

Q. You were by till last Tuesday morning?

A. Yes.

Q. Then you were fired?

A. Well, I don't know but what you would call it fired in a kind of high-toned way. He says if I would not do as he said, I could take the consequences, so I thought I would take the consequences.

Q. You went off and got full?

A. That is a sailor's fault at all times.

Mr. DENMAN.—That is all.

Mr. CAMPBELL.—I would like to see the statement that he has filed with the owners. Mr. Burnett says he will produce it.

(A recess was here taken until two P. M.) [560]

AFTERNOON SESSION.

Testimony of Edward S. Hough, for Claimant.

EDWARD S. HOUGH, called for the claimant, sworn.

Mr. DENMAN.—Q. Your name is Edward S. Hough?

A. Yes, sir.

Q. What is your occupation?

A. Consulting engineer and marine surveyor.

Q. How long have you been a consulting engineer and marine surveyor? A. About 16 or 17 years.

Q. Where did you get your training for that profession?

A. Principally in England, partly in France, partly here.

Q. Whereabouts in England? A. London.

Q. Where were you there?

A. I was with the Thames Iron & Ship-building Company, as articled pupil.

Q. What did you do there as articled pupil?

A. Practiced in the patent shop and in the engine shop and a short time a moulder.

Q. Where did you go from there?

A. To Medley, Simms & Field.

Q. Where were they? A. Westminster.

Q. And what are they?

A. They are marine engineers.

Q. Where were you in that concern?

A. I was in the drawing office and in the erecting shop.

(Testimony of Edward S. Hough.)

Q. How long were you there?

A. In the two places, a little short of four years.

Q. And during that time you studied engineering?

A. Yes.

Q. Where did you go from there?

A. I went for a short time to sea.

Q. In what capacity? A. Assistant engineer.

Q. In what waters?

A. On the east coast of England and the Mediterranean. [561]

Q. And after that?

A. I was about two years on the coast of Tunis, Tripoli.

Q. What were you doing there?

A. I had charge of a tow-boat, and I had charge of some machinery ashore.

Q. What were you doing on that coast?

A. I was with a concern which was exporting esparto grass.

Q. What is that.

A. It is used in paper making. It is gathered on the hills of Tunis and Tripoli. And I had charge of some machinery, also of a tow-boat and a launch, and the loading of the vessels that came to port.

Q. After that, what did you do?

A. I went to British Columbia and then I came to San Francisco.

Q. And engaged in marine affairs during all that time?

A. I went to the Union Iron Works, and from there to the Risdon Iron Works, and to the Pacific

(Testimony of Edward S. Hough.)

Rolling Mills, and I finished at the Main Street Iron Works.

Q. In what capacities in those different places, generally? A. Draftsman.

Q. On marine engineering work?

A. On marine work, excepting at the Pacific Rolling Mills.

Q. What were you on there?

A. General structure work.

Q. How long have you been acting as a surveyor?

A. I have been attached as a surveyor to the Bureau Veritas register for about 11 years.

Q. In the port of San Francisco? A. Yes, sir.

Q. What are your duties as such surveyor?

A. I am engineer surveyor, to survey those vessels annually or periodically which are classed with the Bureau Veritas.

Q. Do you examine into damage to vessels?

A. Yes.

Q. And make reports on them? A. Yes. [562]

Q. Is that a part of your duty in your profession?

A. Yes.

Q. What is the Bureau Veritas?

A. It is a sister classification to Lloyds, or the American record.

Q. I ask you if you recall seeing the steamer "Beaver" after she had had a collision with the steamer "Necanicum" sometime last October.

A. I saw her at the Union Iron Works; yes, sir.

Q. I ask you whether you recognize these photo-

(Testimony of Edward S. Hough.)

graphs in "Libelant's Exhibit 4," a group of photographs.

A. I saw the vessel at the Union Iron Works, but I made no close examination of her.

Q. I ask you whether you recognize the bow of the vessel.

A. I recognize the bow of the vessel.

Q. And generally the conditions shown by these photographs?

A. The view of the vessel I had was more particularly on the port side.

Q. Now, I ask you whether you have examined *this* photographs themselves.

A. I have seen some photographs of the vessel.

Q. You have seen that exhibit, have you not, at my office? A. Yes, sir.

Q. Will you look over them carefully again. You have just examined "Libelant's Exhibit 4," have you not? A. Yes, sir.

Q. I ask you to examine this plan prepared by Mr. Dickie, marked "Libelant's Exhibit No. 7."

A. I have done so.

Q. I called your attention particularly to the plan at the bottom of the blue-print showing a broken line on the port side of the "Beaver," with the drawings of the different decks, the shelter deck, the main deck and tank-top, with certain wavy lines indicating a fracture or bending of some kind. I will ask you some preliminary questions first. About how large is the [563] steamer "Necanicum"?

(Testimony of Edward S. Hough.)

A. Well, I would say she is probably about 175 or 180 feet long.

Q. What would you say her displacement was light, unloaded?

A. It might run 1,000 or 1,100 tons, approximately.

Q. Presume now that the "Necanicum" is lying dead in the water, and that the steamship "Beaver" is approaching her at an angle of the center lines of the vessel of 45 degrees; presuming that the "Beaver" is going at a very considerable rate of speed, between five and ten knots, would, in your opinion, the "Beaver" receive the injuries appearing from these photographs and that plan when she struck the "Necanicum"? A. I think she might.

Q. You think it is a likely thing? A. Yes.

Q. Would there be a pivoting motion on the "Necanicum" when struck at an angle of 45 degrees?

A. Yes.

Q. About where would be the pivoting point?

A. It would be approximately, I should judge, about one-third her length from the stern.

Q. I am presuming now that she is light, has no cargo in her, and say she has half her oil supply still on board, and that she carries her oil aft; under those conditions, you would say the pivoting point would be about one-third the length from the stern?

A. I would think so; yes.

Q. What part of the "Beaver" would the "Necanicum's" bow first enter? A. The flare.

Q. Presume, now, that the "Beaver" is moving

(Testimony of Edward S. Hough.)

ahead at a very considerable rate of speed, what would be the effect upon the "Necanicum" of striking this flare, as compared with the later effect of striking the more perpendicular portion of the "Beaver's" hull below? [564]

Mr. CAMPBELL.—He has not stated it would strike that portion yet. Your question assumes a fact that he has not stated.

Mr. DENMAN.—It appears in evidence from your photographs, which he has just examined, that it struck clear down to the water's edge. It says it would strike first the flare. Now, I am entitled to ask this question.

The COURT.—The objection is overruled.

Mr. CAMPBELL.—An exception.

A. The effect on the "Necanicum" would be to damage the stem and the adjacent work, and to set it over to port.

Mr. DENMAN.—Q. What would be the effect when it struck the more perpendicular portion of the "Beaver" lower down, as the "Beaver" went ahead and completed the striking which is begun by hitting the flare?

A. Do you mean the damage effect on the "Necanicum"?

Q. No, the moving effect on the "Necanicum," the impact.

A. The "Necanicum" would move to port; her bow would swing to port slightly, then she would be driven back.

(Testimony of Edward S. Hough.)

Q. I ask you whether the scars shown in this picture sustain that theory, showing you "Libelant's Exhibit 4," photograph "A."

Mr. CAMPBELL.—I object to the question as a leading question.

Mr. DENMAN.—But I am examining an expert. I am asking him whether the picture sustains his view. It is the photograph you put in evidence.

Mr. CAMPBELL.—I do not think you can ask him a leading question under the rule, unless it is in positive contradiction to a question that has been propounded to other witnesses.

The COURT.—I don't quite catch that, Mr. Campbell.

Mr. CAMPBELL.—I say that I do not understand that the rule [565] against leading questions does not operate against expert witnesses.

The COURT.—Your objection is that the question is leading?

Mr. CAMPBELL.—Yes.

The COURT.—The objection will be sustained.

Mr. DENMAN.—Q. Will you examine the photograph I have just handed you and tell me what you see there that indicates the manner in which the two vessels came together and the effect, in any, in motion upon the "Necanicum."

A. It would appear to me from this photograph that the upper portion of the "Necanicum's" stem may have found the forecastle plating in about here.

Q. That is, a little abaft the point "X"?

(Testimony of Edward S. Hough.)

A. In here somewhere. It looks to me like a frame there. It might have touched here, slid over the frame, and then have set further in at that point.

Mr. CAMPBELL.—Q. That is, touched forward of the line “X”?

A. Apparently, as far as I can judge from that photograph. It looks as if she might have slid there over this frame projection and back over the two frames next. Then from this, this vessel moving forward slightly, I would take it that the lower portion of the “Necanicum’s” stem would then foul this portion of the “Beaver” and fetch up against the heavier work in the stringers, and perhaps the fore-peak tank, and then she would be driven back.

Mr. DENMAN.—Q. That is, in the lower portion of the picture? A. Yes, sir.

Q. What would be the effect on the “Necanicum” during the period in which the bow was as compared with the “Beaver,” moving aft in the direction from “X” to “Z”?

A. The “Necanicum’s” bow [566] would swing to port.

Q. And what would be the effect when the “Necanicum” struck the vessel at the point from “B” above as indicated by the scar there?

A. Then she would be driven back in this direction somewhat.

Q. When you say back in this direction somewhat, do you mean—

A. (Intg.) At an angle approximating the angle

(Testimony of Edward S. Hough.)

at which she had been struck, the difference being that amount that the "Beaver" had advanced in the meantime.

Q. So that the first motion, as I understand you, would turn her slightly to her port, and the second would drive her back? A. Yes.

Q. I ask you to examine this photograph which I will call Claimant's Exhibit "J."

Mr. CAMPBELL.—May I see it, Mr. Denman? It is already in evidence, is it not?

Mr. DENMAN.—Well, whether it is one of the group, or not, I am going to put it in now.

Mr. CAMPBELL.—I am asking you whether it is one of the group.

Mr. DENMAN.—I don't know whether it is or not, my impression is that it is.

Q. And I ask you if from that photograph you can determine whether or not this line which is called—what is that called? A. The bead.

Q. I ask you whether or not the bead was struck before reaching the "V" marked by me "V," and if so, at what point was the beading struck.

A. It would appear to me that it fouled in about here (indicating).

Q. That is to say, at the point marked "F"?

A. In about there, [567] somewhere.

Q. I call to your attention below the beading a peculiar scraped condition apparently of the vessel, and ask you whether or not, in your opinion, that could have been caused by any mere bending of the

(Testimony of Edward S. Hough.)

plate due to a striking further aft.

A. I don't think, Mr. Denman, I could say positively on that; I don't think the surface indications are clear enough.

Q. You do not? A. No.

Q. Have you any doubt, though, about the beading itself?

A. I think there is a set in the beading. There are no marks sufficient below there. There is a set here as though something had fouled it.

Q. Could that mashing of the rounding of the beading be caused in any other way except by a blow?

A. Not that I am aware of.

Mr. DENMAN.—I will call this to your Honor's attention as we go along.

(The photograph was here marked "claimant's Exhibit "J.")

Q. I notice on this large picture a line of dots extending up and down the side of the vessel apparently over the riveting, and I ask you whether or not you know at what angle the rivets in a vessel of that type are placed with reference to the line of the keel.

Mr. CAMPBELL.—I submit the question is immaterial, irrelevant and incompetent, if the Court please. The question is at what angles are the rivets set in that vessel.

The COURT.—That is really the question; the objection is sustained.

Mr. DENMAN.—Q. Presuming now that the line dotted on the side of the "Beaver" represents a perpendicular line to the [568] water line at the

(Testimony of Edward S. Hough.)

time of the collision, I ask you whether or not you can tell from an inspection of the photograph whether the "Beaver" was going ahead at the moment of impact.

Mr. CAMPBELL.—I object to the question on the ground that it contains an erroneous assumption of fact. Your Honor will recall that the line which was drawn on the photograph parallel up and down was drawn by Mr. Evers as a line which he thought was parallel to the row of rivets, and not a line which was drawn purposely perpendicular to the water which is shown in the photograph.

Mr. DENMAN.—The water in the photograph is the water in the basin at the Union Iron Works after the vessel had been lightened, or after something had been done so that her draft was away down to nothing. The testimony that was given by Mr. Dickie is to the effect that the rivets are perpendicular to the line of the keel. It is on that testimony that I am examining the witness.

Mr. CAMPBELL.—But my recollection is, Mr. Denman, that you asked Mr. Evers to take the photograph and by means of a lot of dots to extend them down along the line of rivets on the frame; and then you asked Mr. Evers to draw a line on the photograph parallel to that line of rivets; and for that purpose I obtained my dividers. I do not understand that Mr. Evers has testified that the line which he has drawn on the photograph is intended to be a line perpendicular to the water shown in the photograph. You have an optical deception of a

(Testimony of Edward S. Hough.)

photograph with the distorted conditions of the ship.

Mr. DENMAN.—If the Court please, we are permitted to make this deduction. If Mr. Dickie says the rivets are perpendicular to the line of the keel and Mr. Evers draws a line along the line [569] of rivets, we are entitled to say that that line is perpendicular to the line of the keel. That is the deduction I am endeavoring to use here.

The COURT.—That would seem to follow. The objection is overruled.

Mr. CAMPBELL.—Your Honor, I am not dissenting from the Court's ruling, but I would like to make just one suggestion. The correctness of Mr. Denman's suggestion that the line which has been drawn parallel with the line of rivets would be perpendicular to the keel of this vessel, that does not take into consideration the distorted condition of the vessel which was due to the collision. Now, it may be that where he has drawn the line of rivets on this hull, that the hull, itself, was practically undisturbed, but the hull forward of that has been distorted, as we have seen here, thrown around to the left; it therefore does not follow that a line which is drawn forward of a perpendicular line of rivets is a line which is drawn on the side of that vessel perpendicularly to the keel of the vessel. Mr. Denman had him draw a line of rivets which was practically abaft the line of damage on this vessel. Then you have a line drawn on the photograph parallel to that line. But the hull of the vessel beneath that parallel line is in a distorted condition due to the collision. The

(Testimony of Edward S. Hough.)

result of it is that it would produce an optical illusion, if I might speak of it in that way; it certainly would not be an accurate picture of what the perpendicular line would be.

Mr. DENMAN.—That is a matter of argument. If you look at the picture, you will see that, however much an optical illusion it may be, it does not affect the substantial appearance of the line. There is no optical illusion of the straight line of the [570] “Necanicum’s” bow where the “Beaver’s” bow slammed into her; and there is no optical illusion in Mr. Dickie’s drawing here, in which he has given exactly the same situation.

Mr. CAMPBELL.—We are not talking about the drawing now.

The COURT.—Now, what is the question? (Question read by the reporter.) Objection overruled.

Mr. CAMPBELL.—Exception.

A. Using this line, the first incline, associated with this curved line of damage, indicates that this vessel was going ahead.

Mr. DENMAN.—Q. Supposing the line were not on the face of the picture at all, would you have any different opinion?

A. No, sir, my opinion would be exactly the same.

Q. Is there any question in your mind that the first injury to the “Beaver” was forward of the place where the final injury was?

Mr. CAMPBELL.—I object to the question as a leading question.

The COURT.—He has so stated; I assume he

(Testimony of Edward S. Hough.)

stated it as his best judgment.

A. I have assumed from indications on the photograph shown me, that the damage commenced here at the flare, and it follows that this vessel, I judge, must have proceeded forward to sustain or incur the damage below that.

Mr. DENMAN.—Q. Could you account for it in any other way, as you look at those photographs in that exhibit?

A. I don't see any other way by which that vessel could have been damaged in any other way from the bottom up; it follows that the point which projects furthest will receive the first damage.

Q. I ask you whether or not the resistance offered by the upper portion, which is flared, and which is cut into gradually, would [571] be as great as the resistance of the lower portion, where the impact is against perpendiculars.

A. The upper portion of the work is lighter than the lower portion, necessarily so; that is merely weather-proof work here; down below you start on the sheer-strake, breast-hooks, tank-top; it gets stronger, barring the sheer-strake, as you go lower.

Q. Barring the sheer-strake? A. Yes, sir.

Q. I ask you now, if it were of the same thickness, whether striking the flare would offer the same resistance where it is cut into in succession, one piece after another, as you come down the curve, as on the straight perpendicular side of the hull below when they came together.

(Testimony of Edward S. Hough.)

A. There is less resistance up here than there is down there.

Q. For the reason I have just named?

A. You are cutting on an edge there, whereas here you are cutting on an extended surface.

Q. Presuming now that the evidence shows that at some time in the striking of the two vessels, the "Necanicum" jumped violently back, or was driven violently back, at what point would you say that action occurred—at what point in the collision, when striking the flare, or when striking the solid and more perpendicular portion of the vessel below?

A. I would say when she has met this greater resistance.

Q. Lower down? A. Yes.

Q. What would be the effect on the rudder of the "Necanicum" of the first motion you have described, turning the bow of the "Necanicum" slightly to port?

A. Where is the rudder?

Q. What would be the general direction of the force exerted on the rudder?

A. The force would be against the rudder, tending to draw it amidships, force it amidships. [572]

Mr. CAMPBELL.—Q. That is, on the rebound?

A. No, sir; on the first motion, in entering the lighter portion of the structure of the "Beaver," or the "Beaver" mashing itself over the stem of the "Necanicum."

Mr. DENMAN.—Q. It would turn the bow of the "Necanicum" to port? A. Slightly to port.

Q. And she would pivot where?

(Testimony of Edward S. Hough.)

A. The center of weight would be perhaps about one-third away from the stern; that is 60 feet.

Q. And which way would the stern turn?

A. The stern would turn to the right, to starboard.

Q. And which way would that tend to throw the water against the *water*?

A. It would tend to bring it back to amidships if the rudder is over to starboard.

Q. And if the rudder were amidships, it would tend to do what?

A. The pressure would still be there, only less.

Q. What would the tendency be? As you swung the vessel to starboard, what would be the tendency on the rudder?

A. It would throw the rudder to port.

Q. When the driving-back force comes that you have described, in what direction would the rudder be driven as it pressed against the water?

A. The rudder would be driven back again to starboard.

Q. And presuming that the rudder were over on the port side, which way would she be driven back? Presuming now that the rudder had passed the center line and gotten over on the port side and were slammed back?

A. And the stern thrown this way?

Q. No, the stern thrown directly back in the second driving motion, which way would she hit?

A. Let me get that question right.

Q. If it were on the port side of amidships and the

(Testimony of Edward S. Hough.)

vessel was driven directly back, which side would she strike on? [573]

A. I don't quite understand you, Mr. Denman.

Mr. CAMPBELL.—Let me suggest that you take the models, Mr. Denman. You can probably draw your rudder better on the model.

Mr. DENMAN.—I think I can make him understand me all right. I think I can get the idea from my head to the witness' head all right. If I can get the idea to him, I can get an understanding response, even though I might be wrong in my own conclusion.

Q. As I understand it, there is a second motion to this which would be driving her directly back?

A. Yes, sir.

Q. Now, presume that the rudder, instead of being over on the starboard side of amidships, was over on the port side of amidships, and she were driven directly back, what would happen then?

A. The tendency would be to drive her still further to port.

Q. Does it drive her up into the port chock?

A. It fetches up on the stops on that side, or whichever way the tiller happened to be.

Q. In other words, if the tiller was on the starboard side of the center, it would fetch up on the starboard side of the chocks? A. Yes, sir.

Q. Or if on the port side, then on the port side of the chocks?

A. Yes, provided the tiller was forward of the rudder and not back of the rudder.

Q. Which side would the rudder be pressed for-

(Testimony of Edward S. Hough.)

ward if the rudder were on the port side of the vessel?

A. The rudder would be pressed forward on the port side.

Q. Now, presuming that the tiller is on the same side of the rudder post as the rudder, which way would the tiller be pressed?

A. The tiller would be pressed up against the port stop.

Q. And reversing that, if the rudder is on the starboard side of [574] amidships, the rudder would press against the starboard side and the tiller against the starboard chock? A. Yes, sir.

Q. Now, presume in this case that it be shown, as we will show, that the tiller of the "Necanicum" was mashed to starboard, at a point about 18 or 20 inches up the tiller from the center of the rudder stock, that the tiller is a 3-inch square piece of steel, and in the neighborhood of 4 feet long, with the usual heavy iron block at the head, or pair of blocks, for holding the chains that control it, and presuming you find that bent in a direction to starboard, and forward or beyond the point of contact with the chock to the end where the blocks are, I ask you whether, with that wound, the rudder of the "Necanicum" could have been on the port side of the vessel, or amidships, at the time the "Necanicum" was driven back?

A. No, sir; it would have to be on the starboard side.

Q. The deduction from that is that the helm would

(Testimony of Edward S. Hough.)

have to be apart at the moment that the vessel was driven back and this injury inflicted?

Mr. CAMPBELL.—I object to leading questions, putting it right into the mouth of the witness.

A. It would have to be a port wheel. [575]

Mr. DENMAN.—Q. Have you seen the tiller and the rudder on the “Necanicum”? A. No.

Q. I ask you whether your answer was based on the theory that that was the form of the rudder and tiller? A. Something like this one.

Mr. DENMAN.—I offer this in evidence.

The WITNESS.—The tiller with respect to the rudder.

Mr. DENMAN.—I will mark this X on Claimant’s Exhibit “K.”

Q. I call your attention to “M” on that exhibit—look here, Mr. Campbell.

Mr. CAMPBELL.—I assume you have a witness here who is going to testify as to that.

Mr. DENMAN.—Q. I ask you whether “M” is the character of the bending that I have described to you and upon which your answer is given?

A. Yes.

Q. Would it in any way affect your conclusion that the “Necanicum” was driven back by a violent blow, that the rudder-stock was found broken at a point just above the rudder-blade?

A. It would confirm my conclusion.

Q. In your opinion would the mere movement of the “Necanicum” forward to the “Beaver,” presuming now that the “Necanicum” had way on her

(Testimony of Edward S. Hough.)

at the rate of 2 or 3 knots an hour, have bent the tiller-bar to the starboard and forward in striking against the starboard chock? A. No.

Q. Do you believe that any mere forward motion of the "Necanicum" could produce that sort of an injury? A. Nothing but a shock.

Q. Nothing but a shock? A. No.

Cross-examination.

Mr. CAMPBELL.—I understand your testimony to be, Mr. Hough, that you made no careful examination of the "Beaver's" [576] damage. You did not go down there for the purpose of examining it?

A. No, sir.

Q. You were there at the Union Iron Works on other business? A. Yes.

Q. And happened to see her alongside the wharf?

A. Yes.

Q. Where was it, the Union Iron Works plant?

A. At the Union Iron Works plant.

Q. That was after she had been drydocked, was it not? A. No, it was before.

Q. Was she ever at the Union Works plant prior to being docked? A. I believe so.

Q. Are you certain about that?

A. No, I believe so.

Q. Don't you know that she was taken from her wharf on the waterfront in San Francisco directly to the Hunter's Point drydock and docked?

A. I was told she docked subsequent to the time I saw her.

Q. When did you see her, on what day?

(Testimony of Edward S. Hough.)

A. I don't know what day. I saw her when they were putting up the forecastle head-plate on the starboard side; it was all open on the starboard side.

Q. They were putting up that plating? A. Yes.

Q. What do you mean by putting it up, repairing it? A. Yes.

Q. Don't you know that this vessel was docked at Hunter's Point drydock for the purpose of securing bids for her repairs? A. She might have been.

Q. And the bids were let that night and the repairs started the next Monday morning while she was on the dock?

A. I saw a forefoot plate lying on the wharf at the Union Iron Works. I saw her open on the starboard side, in the way of the forecastle—I could see right to the other side. [577]

Q. Then that was after she had been docked?

A. I don't know.

Q. How could you see the forefoot plating?

A. The forefoot plating was lying on the dock at the Union Iron Works.

Q. She would have to be docked in order for that plate to be taken off?

A. Yes. I don't know how many times she was docked.

Q. At the time you saw her at the Union Iron Works the damaged plates had been taken off of her?

A. Yes.

Q. She had been stripped down?

A. They were putting—I don't know what there was on the port side; the starboard side was the one

(Testimony of Edward S. Hough.)

I looked at particularly.

Q. Were the damaged plates on both sides stripped down to the frame?

A. I could not say about the port side.

Q. Have you any recollection at all of seeing them on the port side? A. No.

Q. So that whatever testimony you have given here to-day is simply based upon information that you have gained from the photographs which have been handed to you by counsel from time to time?

A. Yes.

Mr. DENMAN.—One moment. And the plans made by Mr. Dickie.

Mr. CAMPBELL.—And the blue-print that is in evidence? A. Yes.

Q. Now, Mr. Denman, I have traced off on the blue-print, "Exhibit 9," the contour line of the upper deck of the "Beaver" as it was drawn by Mr. Dickie showing it as it should have been before the collision. Assuming, Mr. Hough, that what I have marked the "Beaver" is the contour line of her upper deck—

A. Yes.

Q. There was a question propounded to you by counsel as to the possible penetration when the "Necanicum" was dead in the water [578] lying at an angle of 45 degrees to the center line or keel of the "Beaver." Would you lay on this paper Exhibit "H," which is in evidence as the shape of the bow of the "Necanicum" drawn to scale—will you lay that at an angle of 45 degrees to the keel or center line of the "Beaver"?

(Testimony of Edward S. Hough.)

A. Yes, that is it approximately.

Q. Now are the stems of these steam schooners—you have no knowledge of the stem of the “Necanicum,” have you? A. Not this special one.

Q. Are the stems of the steam schooners usually square across or round?

A. They are flat with a piece 4 or 5 or 6 by 1, flat bow in some cases, and in some cases quarter round.

Mr. DENMAN.—Q. Of iron?

A. Yes.

Mr. CAMPBELL.—Q. That is a flat piece and sometimes a quarter round?

A. Yes.

Q. If the “Necanicum” was lying at 40 degrees to the center line of the “Beaver,” at such a point that her bow had just touched the side or outer edge of the upper deck of the “Necanicum,” her stem would be practically perpendicular to the contour line of the “Beaver” or the flat of her stem would be almost flat against it, would it not?

A. No, the “Necanicum” was light by the stern and her bow, her stem was leaning back somewhat; it was not perpendicular with the water level. You have a flare on the other vessel, and it would depend upon how close the angle of the stem of the “Necanicum” might correspond to the flare.

Q. Assume that the angle of the stem of the “Necanicum” from an upright, that is its being inboard, was less than the flare out of the upper deck of the “Beaver” then when the stem of the “Necanicum”

(Testimony of Edward S. Hough.)

was in contact with the outer edge of the upper deck [579] of the "Beaver," no part of the stem of the "Necanicum" would be in contact with the hull of the "Beaver," would it?

A. Not right up and down. It would touch at the extreme part of the flare, the upper end of the stem of the "Necanicum," and she would gradually take a bearing on the "Beaver" or the "Beaver" would take a bearing on the "Necanicum."

Q. We have not reached that question. I say that if the flare-out of the upper deck of the "Beaver" was greater than the tilting or leaning backward of the stem of the "Necanicum," then when the upper part of the stem of the "Necanicum" was in contact with the outer edge of the upper deck of the "Beaver," no part of the stem of the "Beaver" would be in contact with the hull of the "*Beaver*" below the upper deck?

A. No, just the upper part.

Q. Now then, if the "Necanicum" was so far across the course of the "Beaver" as to cause her stem to have projected beyond the contour line of the upper deck of the "Beaver" and she had been dead in the water and the "Beaver" had come along and struck her in that way, you would have expected the stem to have been torn out of the "Necanicum," would you not?

A. Not necessarily. That depends upon the extent of your fastenings.

Q. What would it have done to the stem? Would it not have torn the stem out, destroyed the stem,

(Testimony of Edward S. Hough.)

the "Beaver" proceeding at the rate of speed that Mr. Denman has stated, 5 to 10 knots?

A. It would have damaged the stem surely.

Q. The "Beaver" is very sharp forward, isn't she? A. Yes.

Q. Supposing that the "Necanicum" was lying so far across the course of the "Beaver" that at the moment of contact between the two vessels, the stem of the "Beaver" was at the point which I have marked with a Roman numeral I, you would [580] have expected that the stem of the "Necanicum" would have been torn out, would you not?

A. I don't know.

Q. Why not? Wouldn't you expect it to have been damaged down to the point of contact on the stem of the "Necanicum" where the stem of the "Beaver" first touched the starboard side?

A. I would expect some considerable damage of course from that.

Q. You would expect it down to the point of contact? A. Yes.

Q. Back to the point of contact on the stem?

A. Sure, with a knife-edge there.

Q. What I am leading up to is this; you have pointed out on this photograph A a point approximately at X which you have said you think to have been the first point of contract between the stem of the "Necanicum" and the side of the "Beaver"?

A. Yes.

Q. Assume that on this drawing, on this tracing-paper that I have made, that that point of contact was

(Testimony of Edward S. Hough.)

at the point X, we will assume, and that the angle at which the two vessels then were was 45 degrees; that at that point of contact the stem of the "Necanicum" must for the first time have touched the "Beaver"? A. Yes.

Mr. DENMAN.—The beading of the "Beaver"?

Mr. CAMPBELL.—Q. This is where it must have come for the first time? A. Yes.

Q. Now then, the moment that these two vessels came into contact, if the "Necanicum" was dead in the water and the "Beaver" were going ahead what would be the tendencies of the forces operating on the "Necanicum"—what result would they tend to produce on the "Necanicum," a backing motion, a rolling away or swinging her around?

A. There would be a tendency to swing her first there. [581]

Q. That would be the first tendency of the force, would it not? A. Yes, I think it would.

The "Necanicum" to some degree would respond to that, would she not? A. To some degree.

Q. That would be to turn her to port?

A. To turn the head of the "Necanicum" to port.

Q. What force then would there be which would drive her in to the hull of the "Beaver" to the extent shown on photograph "I" which has been testified to as a depth of penetration of 3 feet, to my recollection? A. On the "Beaver"?

Q. Yes, A. She would do it herself.

Q. Why? Would she swing her around?

A. She would.

(Testimony of Edward S. Hough.)

Q. She would swing her around?

A. Certainly, there is a tendency to swing her head around and then drive her backwards, because this is the heavier mass.

Q. Then you think by the forward movement of the "Beaver" that her side rubbing against the stem of the "Necanicum," which is not a fixture, but which will move in the water— A. Yes.

Q. (Continuing.) You have a glancing blow against the stem of the "Necanicum," haven't you?

A. Yes.

Q. The natural tendency of which would be to turn the "Necanicum" around and drive her astern, would it not, and at the same time to turn the "Beaver's" bow to starboard, would it not?

A. Very slightly in the case of the "Beaver," if any.

Q. It would have a tendency to start it?

A. Too heavy a ship.

Q. You think that the "Beaver" would be shunted off from the "Necanicum," she would not be moved?

A. Not with that way on it. [582]

Q. What would give way?

A. The tendency of the "Necanicum" to go backwards.

Q. With the tendency of the "Necanicum" to go backwards what force would you have that would cause the "Necanicum" to penetrate the hull of the "Beaver" to a depth of 3 feet?

A. Simply this: You are running a wedge there on the end of this which is to some extent movable,

(Testimony of Edward S. Hough.)

but you run this over the end of it, the radius increases, the vessel continuing on the same course.

Mr. DENMAN.—Q. Which is it that is movable?

A. The “Beaver.”

Q. The “Beaver” is moving?

A. Yes, and the other to some extent movable.

Mr. CAMPBELL.—Q. By movable do you mean in the direction to starboard?

A. At an angle to the “Beaver.”

Q. If you should go down to a vessel without any knowledge of a given result from the propounding of questions to you by counsel and should find the damage in the hull of the ship, in the side of the hull of the ship, with a penetration to a depth of 3 feet, wouldn't you have expected that that would have been punched by some force that was operating against that hull, as a marine engineer?

A. She might have punched herself against something else.

Q. Wouldn't you have expected that to have been punched by a force operating against it?

A. A force, necessarily.

Q. Now have you ever in all your experience seen a case where damage was done such as is shown in this photograph to the “Beaver” on the one hand and the damage done to the stem of a steam-schooner as shown in Exhibit “C,” where that damage alone resulting from a stem like the “Beaver's” impaling herself upon the stem of the other vessel, when the other vessel was quiet [583] in the water?

A. I have not had a similar case that I know of.

(Testimony of Edward S. Hough.)

Q. You have never heard of one that you know of?

A. I don't know of one just now.

Q. You have assumed in one of Mr. Denman's questions that the point that you had marked X—

Mr. DENMAN.—(Intg.) I have Captain Rinder here outside. Is there any chance for your finishing with Mr. Hough in time to examine Captain Rinder this evening?

A. I think so. I am not going *to very* long with Mr. Hough.

Q. On the photograph Exhibit "I" that has been marked with an X, you said that the beading had been flattened; you can't tell in that photograph whether it has been flattened, or not, can you?

A. I think I noticed an inset.

Q. You could not say from that photograph that the beading was exactly flattened out?

A. Here is a shade on the plate. That shade is not cast by a projection, it must be a depression. The beading is next to it.

Q. What you mean to say is that there is an inset to the beading, that the beading has been pressed into the plating? A. Yes.

Q. You do not mean to say that the beading itself has been flattened, the outer edge has been flattened?

A. I could not tell from that photograph; it looks like a half round.

Q. Mr. Hough, if the "Necanicum" was lying at a more acute angle than 45 degrees to the center line of the "Beaver" at the moment of contact between the two vessels the "Beaver" would first touch the

(Testimony of Edward S. Hough.)

port corner of the stem, would she not? A. Yes.

Q. What would then in your judgment be the movement of the [584] “Necanicum” in the same direction as the “Beaver” or would they turn in opposite directions as the “Beaver” glanced by?

Mr. DENMAN.—Assuming that the “Beaver” glanced by of course you would have to come to your conclusion, but I submit that there is no evidence here yet to show that the “Beaver” glanced by but rather that she went ahead and pressed around.

Mr. CAMPBELL.—Q. What would you expect if these vessels were lying at a more acute angle than 45 degrees to the center line of the “Beaver”—would you expect the “Necanicum’s” bow to be turned in the same direction as the “Beaver” or that the “Beaver” would hit her and the vessels would glance off and each go in opposite directions?

Mr. DENMAN.—At what rate of speed?

Mr. CAMPBELL.—The speed you have assumed right along.

A. A tendency to drive the “Necanicum” backwards.

Q. In your judgment which way would her bow go—would it turn around with the “Beaver” or would it glance away?

Mr. DENMAN.—At the first part or the final part of the impact?

Mr. CAMPBELL.—The question is plain.

A. I think there would be sufficient damage because they are locking, carrying the “Necanicum’s” head around.

(Testimony of Edward S. Hough.)

Q. If they met head on, if the met so their center lines were parallel, what would happen?

A. I don't know.

Q. Yes you do. You know whether the head of the "Necanicum" would turn clear around?

A. It is a question how far that stem went into the "Necanicum."

Q. Then supposing they struck at this point—

A. (Intg.) A glancing blow.

Q. (Continuing.) What would become of her?
[585]

A. If this stem were of the same height as the forecastle of the "Beaver," with respect to the "Necanicum," then that would enter in there, smash the "Necanicum's" stem; if she ripped it off entirely, she would make a glancing blow of it.

Q. If she had not ripped it off, would she?

A. She would be driven back until something let go.

Q. Until she turned around in the opposite direction? A. I don't know; I could not say.

Q. Frankly, don't you believe that if those two vessels came in contact with their center lines parallel that the blow between them would be a glancing blow and each vessel would go her own way?

A. With the stem at the same height?

Q. Yes, under the same conditions we have so far, the upper part of the stem of the "Necanicum" is in contact with the outer edge of the upper deck of the "Beaver."

A. I am not prepared to say, Mr. Campbell.

(Testimony of Edward S. Hough.)

Q. Well, at what angle are you prepared to say that in your judgment under those conditions the "Necanicum" would be turned around so that her head was in the same direction as the "Beaver's"?

A. She would run for some distance that way; she would be backed up for some distance.

Q. Would she glance off or be turned around?

A. I could not say.

Q. At what angle would the change come?

A. When this forward work had let go she would slip off.

Q. That would be an instance, would it not?

A. I don't know.

Q. You are a marine engineer, you know what these stems are made of?

A. It depends how far the "Necanicum" might enter the "Beaver" as to whether she is locked there for any time, or not.

Q. What would show the depth of penetration into the "Beaver" under those circumstances, the degree of depth of damage to the [586] stem of the "Necanicum"?

A. That would be one indication.

Q. In your judgment, under those circumstances, if the stem of the "Necanicum" showed as it does in Exhibit "D" there could not be any great depth of penetration, could there?

A. It depends upon what she was bearing against when she entered the "Beaver."

Q. Bear against the upper deck, wouldn't she?

A. Any bent plates?

(Testimony of Edward S. Hough.)

Q. Assume that the deck of the "Beaver" is in the usual condition. A. Any bent plates here?

Q. Where? A. In the "Beaver"?

Q. At the time of the collision?

A. When she entered, did she bend any plates or did she rip them off?

Q. I am assuming at the moment of the contact before the plates are bent at all that the "Beaver" is in the normal condition that vessels are.

A. You want me to state how much damage there was to the upper end of the stem?

Q. Yes. A. I don't know.

Q. But you still think that the head of the "Necanicum" would be turned around under those circumstances with the keel lines parallel, so that these vessels would be headed in the same direction?

A. At that angle she would be driven back.

Q. Would her head be turned around?

A. Not until they had done something more—they might have thrown the helm over and freed her.

Q. If the "Beaver" was making 5 knots would they have time to throw the helm over to produce a condition of that sort, assuming that the vessels were dead in the water? A. Both of them?

Q. No, that the "Necanicum" was dead in the water and the "Beaver" was going ahead between 5 and 10 miles an hour as Mr. [587] Denman has stated to you. A. On parallel lines?

Q. And their keels were on parallel lines and the point of contact was as shown here at the point I mark "D" on this drawing, would the force of that

(Testimony of Edward S. Hough.)

blow of the "Beaver" against the stem of the "Necanicum" turn the "Necanicum's" head around in the same direction as the "Beaver's" head?

A. It would push her out. That is all I can say.

Q. Can't you answer my question?

A. That is my answer to the question, it would push the "Necanicum" out.

Q. Would it in your judgment turn her head around in the same direction? A. Not the blow.

Q. Would anything?

A. Yes; if you threw the helm of the "Beaver" over and freed her it might carry the head of the "Necanicum" that way.

Q. If you threw the helm of the "Beaver" to port and threw her bow to starboard—

A. (Intg.) That might spread the ships and that might follow around.

Q. That might carry the "Necanicum's" head around with her? A. It might.

Q. It might do it? A. Yes.

Q. What would do it, carry the "Necanicum's" head around? A. The "Beaver."

Q. How would the "Beaver" be carrying it around if she would be turning away from the "Necanicum"?

A. Just the friction, the locking between the plates, whatever there might be there.

Q. Even if they were meeting head on?

A. If that enters, so long as it is, she is going to be carried around.

Q. Have you ever seen a collision of that sort?

(Testimony of Edward S. Hough.)

A. Not such as you describe. [588]

Mr. CAMPBELL.—I offer that in evidence.

(The document is marked “Libelant’s Exhibit 14.”)

Q. Would you expect to find the damage done to the “Beaver” as shown by this photograph if at the time of impact the “Necanicum” was going astern?

A. There would be less damage.

Q. By that I understand you to say you would not expect to find the damage shown by this photograph if at the time the “Necanicum” was going astern.

Mr. DENMAN.—At what rate?

Mr. CAMPBELL.—Going astern at all.

A. I say less damage because you don’t indicate anything positive about the speed.

Q. Then at any speed astern, the faster she was going astern the less damage you would expect.

A. Yes.

Q. If she was going astern at any speed at all you would expect less damage than what you see by this photograph.

A. On the theory that if she was going astern as fast as the “Beaver” was going ahead there would be none.

Q. Upon that theory or upon any other theory would you expect to find such damage as was done to the “Beaver” to have been inflicted upon her if at the moment of impact the “Necanicum” had sternway? A. Sternway to what extent?

Q. Any sternway.

A. All I can say is there would be less damage.

(Testimony of Edward S. Hough.)

Q. Then it is a fair deduction on my part that you would not expect the damage shown by the photograph under these circumstances.

Mr. DENMAN.—You are presuming the same speed on the “Beaver” or more or less?

A. The same speed is supposed to apply.

Mr. CAMPBELL.—We are assuming the same speed. [589]

A. The “Necanicum” going astern at an indefinite speed the damage would be indefinite, I could not determine it.

Q. If she had any sternway would you expect it to be less than shown by the photograph?

A. Less.

Q. If she had sternway of $\frac{3}{4}$ of a knot an hour you would expect materially less damage, would you not?

A. I don't know.

Q. You said that the resistance at the line of the upper deck would be less than the resistance of the hull in the region of the tank-top. The fact that the upper deck was damaged as it was, crushed in, and that the damage extended down to the keel of the “Beaver” shows that there was considerable force of impact between the two vessels, does it not?

A. Yes.

Q. With the “Beaver” driving ahead from 5 to 10 knots, would she begin to turn the “Necanicum” instantly with the first impact, when they struck at an angle of 40 degrees? A. I think not.

Q. What would be the first resultant of the force?

A. A tendency to slide up on the angle formed by

(Testimony of Edward S. Hough.)

the forecastle deck of the "Beaver."

Q. That is to glance toward the "Beaver's" stern?

A. Yes, it would be a wedge action, starting very gradually.

Q. And you would expect the first resultant of the forces would be for the "Necanicum's" bow to go toward the "Beaver's" stern?

A. No, I said gradually.

Q. I am asking you what in your judgment would be the first resultant of the application of those two forces.

A. It would be to take the "Necanicum" with the "Beaver."

Q. With the "Beaver," to turn her head with the "Beaver"? A. With the "Beaver."

Q. Then you would not expect the "Necanicum's" prow to drive into the "Beaver" at the same angle at which the center lines [590] of the vessels lay at the moment of impact, would you?

A. It could not possibly be precisely the same angle.

Q. It would be more of a perpendicular angle to the keel; that is, the keel of the "Necanicum" would be more perpendicular to the keel of the "Beaver"?

A. That does not change.

Q. That does not change? A. No.

Q. Why wouldn't it change?

A. Because you have not altered the draught of the vessel.

Q. We are speaking of the center line. If you are

(Testimony of Edward S. Hough.)

going to be technical on keels, we will take the center line.

A. If this would swing the bow around it would not alter the angle of the "Necanicum's" bow with respect to the keel.

Q. No, but you alter the angle in the center lines of the vessels.

A. Yes, from 45 to something else.

Q. Then you would expect to find at the time of the first moment of impact or contact that the angle of the two center lines to each other would widen, would you?

A. That is from the 45 assumed in the first place?

Q. You would not expect it to go in at 45 degrees straight then? A. No, not precisely.

Q. Your statement to Mr. Denman was that you would expect a slewing motion first or a throw-back motion first on the part of the "Necanicum"?

A. A slewing motion.

Q. How materially would that develop before you got to the backing motion? A. That is indefinite.

Q. Would it swing through an arc of several degrees?

A. Through some, I could not say just what.

Q. During that time you would have the angle of the center line of the vessels widening, wouldn't you?

A. Changing, yes.

Q. Widening, wouldn't you; enlarging?

A. Nearer to a right angle. [591]

Q. Can you tell me how far you think she would

(Testimony of Edward S. Hough.)

swing so as to widen that angle until the thrust-back came? A. No.

Q. The thrust back would come instantly that the "Necanicum" was in contact with that portion of the hull of the "Beaver" which did not give, would it not? A. It would start to back then.

Q. It would start to back the moment that she had penetrated to the depth shown in the photograph, or to the full depth of the penetration?

A. The moment the material—

Q. (Intg.) Had ceased to give?

A. Had ceased to give, or thereabouts.

Q. Now then, how much would you expect the head of the "Necanicum" to swing to port before that backing movement began? A. I could not say.

Q. You could not say? A. No.

Q. Well, as the head of the "Necanicum" swung to port her rudder being hard aport at the moment of impact, so that the blade was over on the star-board side against the stock, if with her rudder in that position her head was swung by the forward movement of the "Beaver" then the blade of the rudder would be swung toward the port side of the vessel the same distance that the bow would be swung, would it not? A. That does not follow.

Q. Why not?

A. That does not follow, for the reason that there is more or less spring in the steering-gear.

Q. Then would the blade move more or less? What has the steering-gear got to do with it?

A. A good deal.

(Testimony of Edward S. Hough.)

Q. The steering-gear would never hold it?

A. There is more or less spring in Manilla leads and it is impossible to tell just what the angle of the rudder would be. [592]

Q. You would expect as the bow of the "Necanicum" was swung around only on the swinging movement, you would expect the blade of the rudder to swing through a similar arc, would you not?

A. It would have a tendency to go back to the center line.

Q. If the helm was hard aport and the bow of the "Necanicum" was swung around to port you would expect by reason of the steering-gear that the blade of the rudder would not swing through as large an arc as the bow travels? A. I don't know.

Q. Haven't you any ideas upon the subject?

A. I could not determine what that might be.

Q. You could not? A. No.

Q. Now, if at the time that the thrust-back on the "Necanicum" came the blade of her rudder having been over against the starboard side had not reached a center position, amidships position, then with the thrust-back it would be thrust back against the side at which it originally rested, would it not?

A. Yes, on the starboard side.

Q. Would the friction upon the steering-gear of the "Necanicum" check the swing of the rudder either with the turning movement or with the backing movement? A. To some extent.

Q. Materially, would it not? A. Too indefinite.

Q. Too indefinite? A. Yes.

(Testimony of Edward S. Hough.)

Q. Taking the friction of the steering-gear into consideration, would you expect that the blade of the rudder would swing through the same arc as the bow of the "Necanicum"? A. No, less.

Q. Then if the "Necanicum's" bow swung through an arc of 90 degrees, you would not expect the rudder to swing through an arc of 90 degrees, would you?

A. No, less. [593]

Mr. DENMAN.—Are you referring to the swinging before or after the impact, Mr. Campbell?

Mr. CAMPBELL.—Well, we have been talking about after the impact right along.

Mr. DENMAN.—My questions were all directed to the swinging before the impact and the driving back after the impact and had nothing to do with the swinging of the vessel after the impact was over. There are three motions there.

Mr. CAMPBELL.—I have no further questions, Mr. Hough.

Redirect Examination.

Mr. DENMAN.—Q. I hand you Claimant's Exhibit "C" and ask you whether, assuming that that is the condition of the "Necanicum's" bow after the collision, that in any way alters your opinion as to the various maneuvers you have described and their causes? A. No, sir.

Q. Does it or does it not correspond?

A. It seems to have confirmed what I have said.

Q. Now, presuming that the "Necanicum" was at an angle of 45 degrees, and that the point of her nose

(Testimony of Edward S. Hough.)

actually engages the "Beaver" as the "Beaver" comes along at a speed of, say, 10 knots, and that the two are at the point of engagement at an angle of 45 degrees center lines; as the "Beaver" drives up and turns the "Necanicum" to her port on her pivoting point, the "Necanicum" being held to a certain extent by the friction of the water behind and on her sides, would the "Necanicum," as she turns to her port and swings around a circle on her pivot, drive into the side of the "Beaver," or would she simply move along the side of the "Beaver"?

A. She would drive in.

Q. I will endeavor to draw in a crude way what I consider to be the position of the two vessels. Presuming that the point marked [594] "P" is the pivot of the "Necanicum," and that the "Beaver" is as written on here, and that the "Beaver" is going ahead at 5 to 10 knots, will you illustrate by drawing a dotted second figure showing what would happen to the "Necanicum" with reference to the "Beaver" as she swings around the pivot "P," the "Beaver" moving ahead, and illustrating the point of the "Necanicum" as it enters or moves along the side of the "Beaver"?

A. This being the heavier vessel, will proceed on her course approximately, and she will straighten out the "Necanicum" in so doing. This being the point of resistance, to some extent the resultant force will be that this must enter. This being that line, the true line through which she should be

(Testimony of Edward S. Hough.)

turned, assuming this to be stationary, the "Beaver" would proceed and would receive an indentation due to a portion of this arc less what this might go back.

Q. The arc that you have described is the arc commencing at the point of the "Necanicum"?

A. The radius is from the assumed center of pivot to the bow.

Q. Will you draw the circle in, as near as you can?

A. That would be the radius. Now, as that is a heavier vessel and proceeds on her course, then the proportion of this arc would be accounted for in this vessel.

Q. Make a dotted form of the "Beaver" as she moves ahead and show the entry or the position of the two vessels as the "Necanicum" is shoved forward and along the arc you have described, and as the "Beaver" moves forward.

A. That would be the tendency. This will have backed here to some extent.

Q. You mean the "Necanicum," point "P," would back somewhat?

A. Yes, otherwise you would have the full depth of the arc in the side of the vessel which has not changed her course. [595]

Q. By arc, you mean the line "A-R"?

A. No, sir; I mean this depth here.

Q. I say the arc you are speaking of is—

A. (Intg.) I should have said the reverse side of the arc, or the distance from the circumference to the center line.

Q. Do I understand from this drawing, then, that

(Testimony of Edward S. Hough.)

the point of the "Necanicum's" nose will be nearer the center line of the "Beaver" as the "Beaver" forces the "Necanicum" around on this arc?

A. That being the center line of the "Beaver," yes.

Q. Will you mark the second point that you indicate as nearer the center line of the "Beaver"?

A. This is the first position and that is the second position.

Q. Mark the first position as "1" and the second position as "2." Have you done so?

A. I have done so.

Q. Do you believe that the "Necanicum" would be turned as much as four or five feet by the turning motion before the driving motion of the total impact would come?

Mr. CAMPBELL.—The witness has said time and time again in answering my questions that he could not figure it.

Mr. DENMAN.—I know, but I want to get his maximum and his minimum.

Mr. CAMPBELL.—I object to the question, your Honor, as a leading question.

Mr. DENMAN.—You have drawn it out on cross-examination.

Mr. CAMPBELL.—I endeavored to.

The COURT.—You might put the question in some other form. The objection that it is leading is sustained.

Mr. DENMAN.—Q. I want you to presume in this case that after the final impact, the "Necanicum"

(Testimony of Edward S. Hough.)

was swung around until she was about approaching parallel to the "Beaver"; and I am speaking [596] now of that portion of the swing—of the turn—prior to the violent impact of meeting the solid portion of the vessel below, what would you say would be the maximum of the turning, or could you say what would be the maximum of the turning of the "Necanicum" prior to the driving of the solid blow?

A. Too indefinite.

Q. All you can say is that there is a tendency?

A. Yes, sir.

Q. And a force would exert itself in that way?

A. It would carry a vessel that way, yes.

Q. Mr. Campbell asked you about the vessel going astern prior to the moment of impact; I ask you whether, in your opinion, if the "Necanicum" had been going astern at the rate of $\frac{3}{4}$ of a knot an hour, and the "Beaver" had been coming ahead at the rate of 12 knots an hour, or 10 knots an hour, the forces which you have described here as at work in controlling the relation of the two boats after meeting would have been sufficiently strong to have inflicted the damage you find here on the exhibits?

A. I think so.

Q. At what rate would she be going back, if she were going $\frac{3}{4}$ of a knot an hour; would it be a foot a second?

A. 76 feet a minute.

Q. That would be about $11\frac{1}{3}$ feet a second?

A. Yes, sir.

Q. Assuming that the "Beaver" was going at 17 feet per second and the "Necanicum" was going

(Testimony of Edward S. Hough.)

astern at $1\frac{1}{3}$ feet per second, would it be possible for these forces to operate and produce the damage that is seen in these exhibits? A. I think so.

Q. I asked you whether or not you had seen the "Beaver" after she had received these injuries; did you notice at that time the flare of the "Beaver" in a general way?

A. Not specially; I knew beforehand.

Q. You knew beforehand what the flare was?

A. Yes, approximately. [597]

Q. So it did not require an observation of the injuries she received there for you to know that?

A. I had noticed that on both vessels previously, on both the "Beaver" and the "Bear."

Q. They are sister ships, are they?

A. Yes, practically.

Q. You said at one point that the vessels might or might not lock; I ask you whether that is a problematical matter in any event, or is there any scientific way of calculating that they will lock as the two vessels slide along with the variations of friction in the two sides?

A. It depends entirely whether the damage has ragged edges or merely a smooth surface.

Q. Assuming the two surfaces now prior to any damage, with the natural irregularities of either.

A. The sharp corner of the stem band on the "Necanicum" would cause considerable friction on the projecting bead before it started to slide and cut.

Q. Would the friction in any way be heightened by the fact that there was a slight after rake of the

(Testimony of Edward S. Hough.)

“Necanicum,” on the “Necanicum’s” nose?

A. No, sir.

Q. It would not? A. I think not.

Q. It would not have any lifting effect under the counter of the “Beaver”? A. I think not—

Mr. CAMPBELL.—Just a moment. I object to that as leading.

Mr. DENMAN.—Q. How much do velocity and impact play a part in the engaging of the two, as to whether or not there shall be a locking?

A. When I used the word “locking,” I meant when one vessel is engaged with the other, entered the other.

Q. And I ask you whether or not that entry would or would not be affected by velocity and friction, whether those are the two forces that determine the entry? A. Yes, sir.

Q. And as I understand your answer it is that the elements entering [598] into that would be so variable that you could not say exactly at what point the entry would be made?

A. It would be impossible to compute that.

Mr. DENMAN.—I want to offer in evidence this exhibit to which Mr. Hough has referred as Claimant’s Exhibit “L.”

(The document was here marked Claimant’s Exhibit “L.”)

Q. That is the exhibit in which you have described the radial movement of the “Necanicum”?

A. Yes, sir.

(Testimony of Edward S. Hough.)

Recross-examination.

Mr. CAMPBELL.—Q. What would be the significance in your mind of the “Beaver” suddenly rolling to starboard at the time of the blow; would that mean a shunting off in her course?

A. Suddenly rolling bodily to starboard?

Q. So that the effect to a man standing on the vessel would be to have the vessel roll to starboard, would that be a shunting off?

A. And always maintained in the same straight line, going bodily to starboard?

Q. To a person standing on the deck of the “Beaver,” and the sensation to him is that the vessel is rolling to starboard.

A. To have a tendency to bring the lower portion of the “Beaver” into more active contact with the lower portion of the “Necanicum.”

Q. Would you say that would be indicated by a thrust on the part of the object that it had struck?

A. It certainly would be a thrust.

Q. Is it not something that would follow from a thrust on the part of the “Necanicum”?

A. Am I to assume that the “Necanicum” is now in motion and being propelled against the other vessel?

Q. Yes. Is not that something that might well result from the “Necanicum” being thrust against the “Beaver”?

A. I think the [599] angle of the flare of the “Beaver” is not so different to the angle of the stem

(Testimony of Edward S. Hough.)

of the "Necanicum" as to cause any serious rolling action.

Q. But then, supposing that she did roll, would not that indicate all the greater force on the part of the "Necanicum"?

A. It would indicate that the resistance at the forecastle-head was greater than elsewhere.

Q. Is that a fair answer to my question?

A. I assume that to be the answer you are seeking, Mr. Campbell.

Q. Would it not indicate thrust on the part of the "Necanicum"?

A. It would indicate a force delivered to the "Beaver."

Q. From the "Necanicum"?

Mr. DENMAN.—You have just assumed that the "Necanicum" had speed on, have you not, Mr. Campbell?

Mr. CAMPBELL.—Of course, I appreciate that.

Q. Supposing a passenger standing on the upper deck of the "Beaver," in the after part of the vessel, should describe the sensation of the impact as a rolling of the "Beaver" to starboard, would not that indicate to your mind a thrust on the part of the "Necanicum"?

A. It would indicate the application of force.

Q. And would it not indicate an application of force on the part of the "Necanicum"?

A. No, sir; not as a necessity; it would indicate the application of force on the side of the "Beaver," either received or delivered.

(Testimony of Edward S. Hough.)

Q. Either received or delivered? A. Yes, sir.

Q. Do you think the "Beaver," traveling from 5 to 10 knots, could strike this light "Necanicum" dead in the water so as to cause her to roll to starboard?

A. I do not know exactly what the stability of those vessels may be. [600]

Q. What was the weight of the "Beaver"? What was her displacement with a draft of 19 feet forward and of 20 feet 6 aft?

Mr. DENMAN.—I object to that. Displacement has nothing to do with it. It is a question of the tenderness of the vessel. A vessel of 20,000 tons displacement might be very tender.

A. I don't know where the center of gravity of that ship is.

Mr. CAMPBELL.—Q. Where would you say would be the center of gravity?

A. She might run into probably 6,000 tons.

Q. That is to say, six to one, with the weight of the "Necanicum"? A. Probably.

Further Redirect Examination.

Mr. DENMAN.—Q. Have you ever felt a vessel as it touches the wharf keel over to one side?

A. Yes.

Q. Although the forces involved may be very light?

A. I have never stopped to consider the forces, I have felt the effect.

Q. I am assuming now a vessel going very slowly in speed.

(Testimony of Edward S. Hough.)

A. I have seen a vessel go over to a dangerous angle; I have seen where a two-ton furnace shipped on one side would shift the other.

Q. Take the ferry-boats as they come in against the wharves, have you ever felt the listing motion?

A. Yes, sir.

Q. And with a very slow rate of speed on the part of the ferry-boat? A. Yes, entering the slip.

Mr. CAMPBELL.—Q. That is, striking against an immovable object, is it not?

A. There is some elasticity to the wharves.

Q. There would be some difference between the “Beaver” striking the wharf and the “Beaver” striking the “Necanicum” dead in the water, would there not? A. Yes.

Mr. DENMAN.—Q. I will ask you whether or not the 1,000 tons [601] of the “Necanicum,” placed as they were, at an angle in the water from aft forward, struck at the top of the bow first, would offer any considerable resistance to a vessel coming on at, say, 10 to 12 knots an hour, sufficient to create a keeling motion on that vessel, presuming now that the “Necanicum” is lying dead in the water in the position I have described?

A. In some ships they would not feel it. In a vessel such as a high-passenger vessel they might.

Q. Why do you say a high-passenger vessel?

A. With high deck-houses.

Q. With high deck-houses? A. Yes, sir.

Testimony of John H. Rinder, for Claimant.

JOHN H. RINDER, called for the claimant,
sworn.

Mr. DENMAN.—Q. Captain Rinder, what is your occupation? A. Ship broker.

Q. And prior to that what were you?

A. Ship master.

Q. On what vessels?

A. The “Minnesota” was the last; all sorts of ships, sailing ships and steamers.

Q. How many years have you been at sea?

A. 33.

Q. What runs have you been on?

A. Principally in the last few years from here to China.

Q. And prior to that in all seas? A. Yes, sir.

Q. Do you know the steamship “Beaver”?

A. Yes; I have never been on board of her.

Q. You know her type? A. Yes, sir.

Q. You have seen her? A. Yes, sir.

Q. I ask you if, presuming that the “Beaver” answers her helm rapidly and is a sufficiently quick steering vessel to turn herself around completely in four minutes—presuming these facts— [602] and presuming that she is proceeding at the rate of 15 knots, and that thereupon her helm is ported for 20 seconds, and then put hard aport for 15 seconds longer, and then with her helm hard aport she reverses for 30 seconds, would you expect at the end of that time to find that she had turned as much as 4

(Testimony of John H. Rinder.)

points to starboard? A. Going 15 knots?

Q. Yes. A. Aport and then hard aport?

Q. And then a reverse propeller with a helm still hard aport, the whole maneuver occupying one minute and five seconds? A. She would do about that.

Q. What would be the effect of the reversing of the propeller, presuming the "Beaver" had a right hand propeller, at full speed, while the vessel is going ahead at full speed, with reference to the course of the "Beaver" as she proceeds through the water until she stops?

A. With the ship going full speed ahead and the helm hard aport—I did not catch your question.

Q. Presume now the helm is straight amidships, I am asking you what would be the effect of the reversing propeller?

A. It would turn her head to starboard.

Q. It would turn her head to starboard as she proceeds ahead in the water and until she stops her speed? A. Yes, sir.

Q. She would then follow a curving course to starboard as she went ahead?

A. Yes, sir; her head would turn to starboard.

Q. Captain, have you examined these photographs in "Libelant's Exhibit No. 4," which were withdrawn and shown to you in my office the other night?

A. I have seen them in your office.

Q. Did you look them over carefully?

A. Yes, in your office.

Q. And have you seen that exhibit of the "Necanicum" showing her bow after the injury?

(Testimony of John H. Rinder.)

A. Yes, sir, I have seen all these.

Q. Now, I offer you "Libelant's Exhibit No. 9," a drawing by Mr. [603] Dickie, upon which appears a side view of the port side of the "Beaver," showing the outline of the injuries, as it appears looking straight on, and an outline of the three decks of the "Beaver" as you look down upon the ship, the outer line being the upper deck, the next line being the main deck, and the next line being the peak-tank top, looking down, showing the flare of the "Beaver"; on the port side a broken line showing the condition of the line of the vessel of the upper deck, main deck and peak-tank top, after the injuries received. I will ask you to examine those carefully. I ask you whether the "Necanicum," having a mass of say between 750 and 1,000 tons, lying dead in the water, at an angle of 45 degrees to the center line of the "Beaver," and that the "Beaver" strikes her going at the rate of 5 to 10 knots an hour, I ask you whether you would expect the injuries shown in the pictures and the blue-print I have just shown you?

A. Yes, sir.

Q. Would that be a reasonable expectation from that angle of approach? A. Yes, sir.

Q. Looking at picture "A" in "Libelant's Exhibit 4," and disregarding any of the notations or lines upon the picture, other than the photograph itself, I ask you whether the injuries shown on the side of the vessel indicate that they were accomplished all in one blow, or whether the "Necanicum" struck the "Beaver" first at the flare and then finally after-

(Testimony of John H. Rinder.)

wards on the straight side of the vessel below?

A. Two blows.

Q. By two blows what do you mean?

A. She struck here in the beginning of the damage in the first place, and then she would recall slightly and hit in here again, come in here again. That would be practically two blows.

Q. How about coming down along the line of the flare in succession, [604] one point of contact after another; would there be a succession of contacts there almost continuous? A. Certainly.

Q. What do you mean then by the two blows, that there would be a first point of contact and then a final contact? A. Yes—

Mr. CAMPBELL.—I object to the question as leading. You have been asking half a dozen questions that are strictly against the rule. The witness can testify if he has the knowledge.

Mr. DENMAN.—Q. About where would the “Necanicum” pivot if she were drawing 16 feet 4 aft and 4 feet 10 forward?

A. About $\frac{2}{3}$ of her length from forward, about 80 feet from her stern—no, 60; she is 180 feet long; that would be about 60 feet from the stern.

Q. I am presuming now—well, the draft would be sufficient to indicate that; the tonnage would not make any difference, would it?

A. No; it is the draft that would affect it more than anything else.

Q. Presuming now that the “Beaver” strikes the “Necanicum” in such a way that the “Necanicum’s

(Testimony of John H. Rinder.)

head is turned first slightly to port and afterwards driven more directly back, what would be the effect of the slight turning to port on a wheel that was hard aport at the time? I am speaking now of the wheel.

A. The steering wheel?

Q. Yes. Presuming now that the steering wheel is hard over to port, that would mean that the top spokes were turned hard over to the starboard side of the ship. A. Yes.

Q. Now, presume there is a slight turn of the "Necanicum's" bow to port, what would be the effect on the wheel?

A. Do you mean when the "Beaver" was in collision, at the time of the contact?

Q. I am presuming that the first motion of contact is to turn the bow of the "Necanicum" slightly to port. I am speaking of that [605] portion of the injury which might be inflicted by the flare and the motion given by the flare. Now, what would be the effect of that motion transmitted through the "Necanicum's" hull to her rudder and finally to her wheel, which way would the wheel turn?

A. The wheel would fly back to amidships; the pressure of the water would come on the starboard side of the rudder.

Q. The tendency then would be to run back to amidships? A. Yes, sir.

Q. Suppose, now, that the next resultant of the forces described is to jamb the "Necanicum" violently back, what would be the effect of the rudder on the wheel?

(Testimony of John H. Rinder.)

A. You mean if the wheel was running of its own free will?

Q. Yes, and following the rudder, and presuming also—

A. (Intg.) It would fly back, most likely, and would break the top of the blade of the rudder. It would most likely do that.

Q. Presuming now that by the first motion the rudder has not gone completely to amidships, the rudder being pressed against the starboard chock, but it has not gone completely back to amidships, what will be the effect of the second driving back play on the rudder with regard to the direction?

A. The rudder would go right back onto the break and very likely bend the tiller.

Q. Which side would it go back on?

A. On the starboard side, against the starboard break.

Q. I am offering you now Claimant's Exhibit "K" and ask you to presume that the tiller of the "Necanicum" is found bent, in the condition shown by the diagram "M" on that exhibit; I want you to examine that.

A. I have seen it. I made all the measurements myself.

Q. You have examined the "Necanicum" for the purpose of looking into this question?

A. Yes, sir. [606]

Q. Now, I ask you whether if you found injury in the tiller of the "Necanicum" her rudder could have been over on the port side when the vessel was

(Testimony of John H. Rinder.)

driven back? A. No.

Q. What side must it have been on?

A. The starboard side.

Q. And in that driving back motion, so as to inflict this injury on the bow, would the top of the wheel in the wheel-house turn?

A. The top of the wheel would turn to starboard, it would fly back.

Q. So that the first motion would turn the wheel in the port direction, the top of it, and in the second motion it would turn it back.

A. The whole wheel would.

Mr. CAMPBELL.—I don't like to interrupt you all the time, Mr. Denman, but these are all leading questions.

Mr. DENMAN.—He has given his testimony. Of course, it is very hard to summarize it.

Mr. CAMPBELL.—When the witness has given his testimony, it is unnecessary for you to summarize it now. We can do it in the argument or the Court can do it.

Mr. DENMAN.—Very often I find, to my great distress, when I make a summary, I have not caught the exact succession and my witness has corrected the error. If there is any objection here I will not press the question. Where you have an expert witness, and you have given him a long line of incidental questions, I think it is within the propriety of the rule against leading questions to except a summary that puts them all together, providing you do it fairly.

Q. Is that the way the tiller sets on the "Necani-

(Testimony of John H. Rinder.)

cum's" rudder, in the manner indicated in "X" on this Claimant's Exhibit "K"? A. Yes, sir.

Q. That is to say, the tiller runs back the same way the rudder [607] plate does. A. Yes, sir.

Cross-examination.

Mr. CAMPBELL.—Q. I understand your present business to be a ship broker? A. Yes, sir.

Q. How long have you been engaged in that business?

A. About seven years, six or seven years.

Q. Prior to that time, you were a ship master?

A. Yes, sir.

Q. You never have been an engineer?

A. No, sir.

Q. You have no technical knowledge or training at all of that character? A. No.

Q. When did you make this examination of the tiller of the "Necanicum"?

A. Yesterday morning.

Q. When did you discuss this case with Mr. Hough and with Mr. Denman?

A. The day before yesterday.

Q. In the evening? A. Yes.

Q. And you and Mr. Denman, Mr. Hough and Mr. Burnett went over the whole matter in Mr. Denman's office? A. Yes, sir.

Q. By the turning of the "Necanicum's" head around by the forward movement of the "Beaver," you say that the blade of the rudder, if the helm was hard aport, would be swung to starboard?

(Testimony of John H. Rinder.)

A. The blade of the rudder would be over to starboard.

Q. Would the tackle,—the steering-gear—overhaul as rapidly as that blade would move?

A. Yes, sir, with that gear, with the gear that she has got.

Q. Has she good gear? A. Yes. .

Q. Easily worked? A. Yes, sir.

Q. Remarkably easily worked?

A. I would not say remarkably, but she has good, easy-working gear.

Q. And that gear would work as rapidly as the blade of the rudder would be turned? A. Yes, sir.
[608]

Q. So, practically, there would be no friction on the turning of the blade?

A. No, there would be no friction, not with a hard kick.

Q. You knew before coming here that the stock of the rudder had been broken, did you not?

A. Yes, sir.

Q. Assuming that the “Beaver” was in the approximate position shown on this drawing and the “Necanicum” was in that position, and that the “Beaver” was forging ahead but with her propeller reversing, you would say that her bow would swing to starboard? A. How was the helm?

Q. Amidships.

A. Her head would swing to starboard.

Q. If her helm was aport, she would swing all the more?

(Testimony of John H. Rinder.)

A. She would swing all the more to starboard, as long as she had headway on her.

Q. Under those circumstances, could a collision take place between the "Beaver" and the "Necanicum" unless the "Necanicum" had headway at the moment of impact?

A. How far apart were they—200 yards?

Q. Any distance apart; but take it 200 yards, as they are there. Could there be a collision between the "Necanicum's" bow and the "Beaver's" port bow under the conditions that I have described to you, unless the "Necanicum" had headway at the moment of the collision?

A. No, not as you have them there, I think not.

Q. Assuming that instead of the "Necanicum" being 200 yards off, it was in the position that I now draw, marked "N 2," still bearing at about the same angle, and the "Beaver" as shown in her first position, that is, center line to center line; if with the "Necanicum" in the position "N2" and the "Beaver" as now shown, the "Beaver" forging ahead, with her propeller reversing, so that her bow was swinging to starboard, could a collision [609] take place between those two vessels with the "Necanicum's" bow and the "Beaver's" port bow without the "Necanicum" having headway at the time of the collision?

A. With this ship's engines reversing?

Q. Yes, but she is still forging ahead.

A. No, if that ship is stopped dead, if she has no headway.

(Testimony of John H. Rinder.)

Q. She would have to have headway at the moment of the impact, would she not? A. Yes, sir.

Mr. CAMPBELL.—That is all. I want to put this in evidence.

(The document was here marked “Libelant’s Exhibit 15.”)

Redirect Examination.

Mr. DENMAN.—Q. Supposing she simply had headway enough to bring her to a point say here—

A. (Intg.) Which one?

Q. The “Necanicum,” to a point say here, marked “Nec. 2,” but stopped at that point.

A. But Mr. Campbell says they were stationary here.

Q. But I am now presuming they were moving when seen here, at the position “1,” 200 yards, but supposing when she is in position “2,” and with the “Beaver” continuing at the rate of say 10 knots, would you expect to have found the injuries that you have found on the pictures?

A. Yes, sir; of course you would.

Q. So that the “Necanicum” might very well be at the moment of impact dead in the water, but going ahead in the position that the “Necanicum” is in here (pointing).

A. That makes all the difference in the world.

Recross-examination.

Mr. CAMPBELL — Q. Assuming that the “Beaver” is turning to starboard all this time.

A. She is not turning very fast.

Q. Supposing her helm is hard over.

(Testimony of John H. Rinder.)

A. That makes a difference [610] too; she would be so close there that she could not turn—

Q. (Intg.) By “there,” you mean as shown by “Nec. 2” and the “Beaver”?

A. Yes, sir; she could not turn quick enough there to get clear of this ship.

Q. As the drawing is made, you have the “Necanicum” on the bow of the center line of the “Beaver,” haven’t you? A. Yes, sir.

Q. Assuming that when the vessels are in position “N 2,”—either “Nec. 2” or “N 2,” and the “Beaver” in her present position, and the “Beaver” is forging ahead under a port helm so her bow is swinging to starboard, could you have a collision that would do the damage to the “Beaver” that was done to her if the “Necanicum” was stopped at the moment of impact? A. If she was here?

Q. Under the question I have given you; disregard the picture. A. I don’t understand you.

Mr. DENMAN.—And you don’t say where “N 2” has moved to. You had better show where she has moved to and how she is moving.

Mr. CAMPBELL.—Q. If prior to the collision the “Necanicum” is either in the position marked “Necanicum,” or “N 2,” and the “Beaver” is in her present position, and the “Beaver” continues ahead, with a reversing propeller, but with her helm apart, and the two vessels come into contact, could you have a collision which would do the damage which was done to the “Beaver” unless the “Necanicum” had headway?

(Testimony of John H. Rinder.)

Mr. DENMAN.—When?

Mr. CAMPBELL.—At the moment of impact.

A. You say they are in collision, Mr. Campbell? I don't follow your argument at all.

Mr. CAMPBELL.—Q. Does it not follow that you would have to have the "Necanicum" having headway?

A. Those two can't collide if she has a reverse engine on her. [611]

Mr. DENMAN.—Q. What do you mean by that?

A. If that ship is stopped and if that ship is stopped, they can't collide with this ship if the engines are going full speed astern.

Q. By "those two," you mean the positions marked "Necanicum" and "N 2"?

Mr. CAMPBELL.—Now, Mr. Denman, let me examine the witness. Q. My question is, assuming the "Beaver" has headway and the "Necanicum" has headway, in the positions shown on this drawing, the "Beaver" is swinging to the starboard under a port helm when the two vessels are coming together, could you have the damage inflicted on the "Beaver" unless at that time the "Necanicum" had headway on her so as to have a thrust?

A. You have got me, I don't understand your question now, Mr. Campbell.

Mr. DENMAN.—I suggest to you, Mr. Campbell, that you draw the motion of "N 2" as on the chart there as you want it drawn.

Mr. CAMPBELL.—I don't need any suggestions just now, I can work this out.

(Testimony of John H. Rinder.)

Q. If the "Beaver" goes ahead under a port helm, and with a reversing propeller, she would swing to the starboard, would she not? A. Yes, sir.

Q. Assume that the "Necanicum" comes ahead, I ask you if under those conditions, with the "Beaver" forging ahead and swinging to starboard, you could have a collision which would inflict the damage which was done on the "Beaver" shown by these photographs, unless at the moment of impact the "Necanicum" had headway?

Mr. DENMAN.—The "Beaver" having how much headway at the moment of impact, Mr. Campbell?

A. Yes, sir; you could.

Mr. CAMPBELL.—Q. You could?

A. You could have that accident happen. [612]

Q. And have that damage inflicted on the "Beaver"?

A. And have that damage inflicted on the "Beaver."

Q. At what angle would you have the "Necanicum's" head turned to port by the contact? At what angle would the two center lines of the vessels have to be in order that the "Necanicum's" head, instead of being turned to port in the direction the "Beaver" was going, should be turned to starboard so that the collision would be a glancing collision instead of a penetrating collision?

A. I don't get you as to that, I don't understand your question.

Q. At what angle do you think these vessels came together?

A. An angle of somewhere between 3 and 4 points.

(Testimony of John H. Rinder.)

Q. Give it to me in degrees? A. About 45.

Q. You never saw the damage to the "Beaver" at all, did you? A. No, sir.

Q. All you know about it is what you have seen from the photographs? A. That is all.

Q. At that angle, which way would you expect the "Necanicum's" bow to turn? A. To port.

Q. Could you have a collision between these two vessels in which the "Necanicum's" bow would be turned to port? A. No, not on that bow.

Q. Supposing they struck at a time when the center lines of the two vessels were parallel with their bows in opposite directions. A. Like that?

Q. Yes.

A. No, I don't think they would do that damage then.

Q. Which way would the bow of the "Necanicum" move in that kind of a collision?

A. I don't think she would bring it right over the way that is; she would rub it.

Q. I am speaking about the swing of the bow.

A. She would most likely swing out there to starboard.

Q. She would swing to starboard? [613]

A. To starboard.

Q. You say with the center lines at 45 degrees, the "Necanicum's" bow would go to port?

A. The damage to the bow, you mean?

Q. No; the bow would swing to port?

A. Yes, most likely.

(Testimony of John H. Rinder.)

Q. At what angle between those two would be the first angle at which the "Necanicum's" bow would come to starboard?

A. Not more than 2 points, I don't think.

Q. What do you mean by 2 points?

A. 22 degrees.

Q. From which way?

A. Right ahead from the fore and aft lines. That would be about it.

Q. You think at that angle now shown her bow would be turned which way?

A. It would not be as much as that, it would be about two points.

Q. Which way would the bow turn?

A. It might send her off and she might run down the length of the ship. That is guesswork absolutely.

Q. This is your best judgment as a ship master, is it? A. Yes, sir.

Q. Do you think that at that angle the bow that I mark "N," on "Libelant's Exhibit 14," would be turned to the south?

A. I would not say that for certain at all, I think it would have to be very near right ahead. When I said 2 points, I did not see it on paper. It would shove her right astern.

Mr. DENMAN.—Make it truly 2 points, Mr. Campbell.

Mr. CAMPBELL.—I didn't lay it there, the captain did.

The WITNESS.—I just made it roughly.

(Testimony of John H. Rinder.)

Mr. CAMPBELL.—Q. In what direction do you think she would go if her bow would go to starboard?

A. Very nearly right ahead.

Q. Just lay it down there, Captain, so we can get it.

A. Here is the fore and aft line. No, it would not go 2 points, [614] Mr. Campbell, or anything like it, it would be just about near right ahead.

Q. As I understood your testimony, you would expect that there would be a rebound from the first contact and then a second hitting.

A. A slight rebound when she hit the top gingerbread work.

Q. And she would come into her again?

A. Yes, sir, but it would be almost infinitesimal, it would not be a big rebound.

Q. But it would be a rebound?

A. A slight rebound.

Q. And that would be a backward motion of the “Necanicum”?

A. To push the “Necanicum” right back, just enough to stop her.

Q. Would that rebound be a backward motion of the “Necanicum”? A. Yes, sir.

Q. Then if the “Necanicum” was dead in the water at the moment of the first impact, what force would bring her back toward the “Beaver”?

A. The “Beaver” going ahead, the “Beaver” coming along ahead all the time.

Q. If the “Necanicum” was dead in the water at the moment of the first impact, you say there would be a rebound? A. Yes, sir.

(Testimony of John H. Rinder.)

Q. And then she would come ahead again?

A. Yes, but almost infinitesimal, I said.

Q. What would be the force that would bring her ahead again?

A. She would not come ahead, but the "Beaver" would come ahead onto her.

Q. Then instead of there being a rebound, you mean to say there would be a shove-off?

A. Yes, shoving her off. It would be shoving her, though. It would be practically the same thing.

Q. Would there be a sternward shove on the "Necanicum" or swinging her bow to port?

A. You mean the first blow?

Q. Yes. A. Shoving her bow to port.

Q. I understood you to say you have never been on board the "Beaver"?

A. No. Well, I was on board of one of them when they first came out but I could not say whether it was the "Bear" or the "Beaver," but then I only just walked around her decks. [615]

Q. And that was a good many years ago?

A. When they came out new, about four years ago.

Q. It was six years ago, wasn't it?

A. This was Kittson's ship, wasn't it?

Mr. DENMAN.—Yes.

A. (Continuing.) Then I was aboard the "Beaver," yes; it was only for a few minutes though.

Further Redirect Examination.

Mr. DENMAN.—Q. I call your attention to a drawing, N 2, on "Libelant's Exhibit 15" and ask you

(Testimony of John H. Rinder.)

whether if N 2 proceeded ahead on a course turning her to starboard, and the "Beaver" which is here drawn clear out of proportion to the 200 yard line as you see—200 yards is 600 feet—how long is the "Beaver"?

A. The "Beaver" is 450, I think, or somewhere around there.

Q. And the "Beaver" proceeds ahead, turning to starboard, and the "Necanicum" reaching a point N 4 is dead in the water, and the "Beaver" is continuing at a 10-knot speed, I ask you whether the injuries could be inflicted in the manner you have seen in the photographs? A. How far apart?

Q. I am presuming at the moment of impact.

A. She collides with her?

Q. Yes, she collides with her.

A. You want to know if the damage could have been done?

Q. Yes. A. Certainly.

Q. So the fact that the "Necanicum" is moving at N 2 does not control at all for she may very well be dead in the water at N 4 at the moment of impact?

A. Yes, sir.

Q. Now, presume we put the "Necanicum" still further out there, at N 5, the same thing on a hard aport helm may bring her around to point 7?

A. Just the same thing. [616]

Q. So that a person standing at the stern of the "Beaver" may very well see the "Necanicum" in that position and the "Necanicum" have motion and

(Testimony of John H. Rinder.)

come ahead and still be dead in the water at the moment of impact; that is correct, is it?

A. Yes, sir.

Q. By the position in which the "Necanicum" is seen, I mean N 5?

A. She is moving there but dead when she gets here.

Further Recross-examination.

Mr. CAMPBELL.—Q. If at the moment the "Necanicum's" stem was in contact with the outer edge of the upper deck of the "Beaver" the "Necanicum" was dead in the water would you expect the effect to be to shunt the "Beaver" off? A. No.

Q. Why not?

A. It might shunt the other one off.

Q. Shunt which one off?

A. The "Necanicum," when they collided. With a ship of 5,000 tons, she could not be displaced by a ship of 1,000.

Q. Would she be affected at all?

A. The "Beaver"?

Q. Yes. A. No.

Q. You would not expect her to feel it, would you?

A. No, I hardly think so.

Q. If it was felt on the "Beaver," going at from say 5 to 10 knots—

A. (Intg.) The more the speed the more you would feel it.

Q. If under those circumstances, with the speed that Mr. Denman has assumed, from 5 to 10 knots, the

(Testimony of John H. Rinder.)

“Beaver” was keeled over to starboard so that it was noticeable to a passenger standing on the after end of the upper deck, would you not say that that would indicate a forward movement on the part of the “Necanicum” at the moment of impact?

A. No, not necessarily, Mr. Campbell.

Q. How do you reconcile that with your statement a moment ago [617] that if the “Necanicum” was dead in the water you would not feel it on the “Beaver”? A. What was the other one you said?

Q. The other condition is that the “Beaver” is listed over to starboard at the moment of contact.

Mr. DENMAN.—You said pushed over or keeled over, in one case, and now you say listed over. Which one do you mean?

Mr. CAMPBELL.—Well, take it in both cases.

Q. You said that if the “Beaver” was going ahead at between 5 and 10 knots, and the “Necanicum” was dead in the water, and the “Beaver” struck the “Necanicum” at the point shown in the photograph you would not expect it to be felt on board the “Beaver”?

A. Very little.

Q. Very slightly?

A. Very slightly. I would not expect it to list her over.

Q. No. That is exactly my point. Now, if it did list her over, and if she were listed over by the collision, would it not indicate to your mind, Captain, that the “Necanicum” had headway when they came together?

(Testimony of John H. Rinder.)

A. Either that, or else the "Beaver" was going very much faster than 5 or 10 knots, one of the two; the violence of the blow was very much harder.

Q. A very rational explanation of the situation would be that the "Necanicum" had headway at the time of the collision, would it not?

A. Well, as I say, either that or that the other one was going faster than 5 or 10 knots. Of course I was not there.

Q. Is not a disturbance of the equilibrium of the "Beaver" what you would expect from the headway of the "Necanicum"?

A. You said a vessel of 5,000 tons; she can't do anything but fetch up when that thing is dead; you have no idea what a difference it makes; it makes a very heavy blow, a 5,000 ton [618] blow. If the other ship has anything at all it makes it a great deal worse.

Q. You have said you would not expect to anything more than feel the collision? A. Yes.

Q. My statement to you is, if the force of the collision actually caused the "Beaver" to list would it not indicate that there was headway on the "Necanicum"?

A. Either that, as I said before, or else the "Beaver" was going very much faster than from 5 to 10 knots, one of the two.

Further Redirect Examination.

Mr. DENMAN.—Q. Suppose she were coming at around 12 knots and struck on the flare first and met considerable resistance on the flare before she struck

(Testimony of John H. Rinder.)

down on the body, would you not be likely to have some listing effect at say a 12-knot speed?

A. At 12 knots, yes, just a slight list. She doesn't get much leverage up there right on the bow at that angle.

Q. But the leverage would be the same whether the "Necanicum" was going on, or not?

A. If she struck amidships it would be a great deal different, but right on the point of the bow she would not have the leverage on her.

Mr. CAMPBELL.—Q. It would take considerable force at a point 10 feet abaft the "Beaver's" stem to list her any, would it not? A. Yes, sir.

Mr. DENMAN.—Q. Would it take any more force than is shown in these pictures? A. To do what?

Q. To list her over. Would the force shown in these pictures have a tendency to list her over to port, presuming now that the "Beaver" is running at a speed of 12 knots?

A. When you look at all those pictures?

Q. Yes; would the force there shown as having developed be [691] sufficient to have a tendency to turn her over? A. With a speed of what?

Q. Of 12 knots. A. Oh, yes.

The COURT.—How near are we to the end?

Mr. DENMAN.—I think we have the experiment to describe, and that ought to take, I think, about an hour; and I think that is all with the exception possibly of one sailor witness.

The COURT.—I have put over one matter for this;

(Testimony of G. Peterson.)

so I will take this case up at 3 o'clock to-morrow afternoon.

(An adjournment was here taken until to-morrow, Thursday, October 22d, 1914, at 3 P. M.)

[Endorsed]: Filed Jul. 19, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [620]

Thursday, October 22, 1914, 3 P. M.

Testimony of G. Peterson, for Claimant.

G. PETERSON, called for the claimant, sworn.

Mr. DENMAN.—Q. Captain, what is your occupation? A. Master mariner.

Q. How long have you been a master mariner?

A. 14 years.

Q. On this coast? A. Yes.

Q. Sailing steadily? A. Yes.

Q. Have you ever been on the steam schooner "Necanicum"? A. Yes.

Q. As a master? A. Yes.

Q. How long a time? A. Seven months.

Q. The last seven months A. Yes.

Q. Traveling up and down this coast?

A. Yes, sir.

Q. In various weathers? A. Yes.

Q. Are you familiar with the direction in which the vessel would turn in the event that you are going from full speed ahead to full speed astern as a result of the reversing of the propeller on the vessel?

A. Yes.

Q. Suppose, Captain, that the vessel is going ahead at full speed with 150 pounds of steam and

(Testimony of G. Peterson.)

that you reversed the propeller full speed astern how long will it take the vessel to stop, about?

A. A minute and a half.

Q. Presume, now, that during that maneuver the helm is hard aport; how much will your vessel swing to starboard before she comes to a stop?

A. If the helm is hard aport?

Q. Yes, her helm is hard aport, you are going full speed ahead and you give the order full speed astern, how many points will she turn to starboard?

A. About $3\frac{1}{2}$ points. [621]

Q. Presume, now, that the helm instead of being hard aport is amidships; about how far will she turn?

A. About $2\frac{1}{2}$ points.

Q. Presume, now, that the helm has been turned to starboard so that the vessel is on a starboard helm swinging at the time you begin the reversing maneuver and then you put her full speed astern and put her hard over at the same time, so that during the time she is going full speed astern the helm is hard aport; she starts in with a swing toward her port under a starboard, but at the time that you give her the full speed astern you put her hard aport. How much will she turn before she comes to a stop?

A. I do not quite catch that.

Q. Presuming, now, that you are going ahead at full speed, then you starboard your helm for say 30 seconds; then you give the order hard aport full speed astern. A. Yes.

Q. Then she continues full speed astern with her helm hard aport until she stops. How much will she turn to starboard?

(Testimony of G. Peterson.)

A. From $2\frac{1}{2}$ to $3\frac{1}{2}$ points. She never at any time turns more than $3\frac{1}{2}$ points.

Q. Presuming, Captain, that your vessel is going ahead at full speed and you put your helm hard astarboard and you keep her hard astarboard during all the time that you are reversing at full speed until the vessel comes to a stop. In what direction will the vessel turn under that maneuver, or what directions, if more than one?

A. If you keep your helm hard astarboard?

Q. Hard astarboard all the time until she stops, in what directions will she turn?

A. She will turn to port maybe a point and a half and she will come back again, $2\frac{1}{4}$; that is 2 points altogether, from the time she stops until she comes back. [622]

Mr. CAMPBELL.—I do not understand that answer now. How far to port would she swing, $1\frac{1}{2}$ points? A. From $1\frac{1}{8}$ to $1\frac{1}{2}$ points.

Q. And then how far would she come back?

A. Then she would come back—

Q. The same distance?

A. She would come back about $2\frac{1}{4}$ altogether.

Mr. DENMAN.—Q. So that at the end of the maneuver she would be—

Mr. CAMPBELL.—I object to the leading questions.

Mr. DENMAN.—Q. At the end of the maneuver, Captain, how much would she be over to starboard from the original direction you were sailing in? You see I am speaking of the last maneuver, where

(Testimony of G. Peterson.)

you had her to starboard all the time and you say there were two movements; first you would turn her head to port and then turn her head to starboard. Do you know the direction she is pointing in when she starts? A. Yes.

Q. Do you know the direction she is pointing in when she stops? A. Yes.

Q. What would be the change to the starboard at the end of the maneuver as distinguished from the beginning? A. About $11\frac{1}{8}$ points.

Q. About a point and an eighth?

A. About that.

Q. Captain, these are the results of actual observation, are they? A. Yes.

Mr. CAMPBELL.—Is that the way, Mr. Denman, you prove the experiments?

Mr. DENMAN.—Q. Captain, let me ask you—I forgot to ask you the conditions. What was your vessel drawing forward and aft at the time of these maneuvers? [623]

A. The first time we had these maneuvers she drew 16-5 aft, and 4-10 forward, and the last time we maneuvered she drew less because they pumped the oil out.

Q. But all the maneuvers up to the last one I am speaking of you had 16-4 aft? A. About 16-5.

Q. And 4-10 forward? A. 4-10 forward.

Q. When was that maneuver made?

A. That was on the 13th of October.

Q. Who was on board at that time?

A. I was there, Mr. Falls, Mr. Jones and you were

(Testimony of G. Peterson.)

there, Mr. Denman, and the crew.

Q. What was the condition of the wind?

A. It was light air.

Q. And the tide?

A. The tide was on the flood, about an hour and a half before high water.

Q. An hour and a half before high water?

A. The last experiment, yes.

Q. What direction did you point the vessel with reference to the tide?

A. She was going with the tide and she went against the tide.

Q. Did it make any difference? A. Very little.

Q. You say very little. How much; $\frac{1}{16}$ of a point, $\frac{1}{8}$ of a point, $\frac{1}{4}$ of a point?

A. Well, it all depends on the—

Q. (Intg.) How much in this case difference did it make? A. About $\frac{1}{2}$ a point.

Cross-examination.

Mr. CAMPBELL.—Q. What you have been testifying to, Captain, are the results of an experiment that you claim to have made out here in the bay?

A. Yes.

Q. It was not in answer to a hypothetical question, then, but it was what you testified to, what you had tried out in the bay? A. Yes. [624]

Q. What time of day was it that this experiment was conducted?

A. The first experiment was in the afternoon between 3 and half-past.

Q. What day? A. Last Tuesday.

(Testimony of G. Peterson.)

Q. Last Tuesday? A. Yes.

Q. That would be—

The COURT.—The 13th he said a moment ago.

Mr. DENMAN.—The 13th.

Mr. CAMPBELL.—The 13th.

Q. Was the tide ebb or flood? A. Flood.

Q. How long after the flood?

A. We had the experiment, the last one, about half-past 4, and it would be high water about 6:15.

Q. Then it was right in the full of the flood, was it not?

A. Yes, a couple of hours before high water.

Q. If you swing your vessel with the tide running in the full sweep of the flood, its course would be affected as its bow was turned from directly on to the tide, would it not? The turning of your vessel would be affected as the tide caught it on one bow or the other, would it not?

A. She draws so little water forward that it don't affect her a great deal.

Q. Does not the fact that she draws so little water forward and so much aft make her turn more easily on her heel than she would if on an even keel?

A. We never have her on an even keel; you can't get her.

Q. As nearly as she would be loaded?

A. I don't think so. It don't seem to make any difference.

Q. It does not? A. No.

Q. You think that your bow would swing around just as quickly if you are drawing 10 feet forward

(Testimony of G. Peterson.)

as it will if you are [625] drawing 4 feet forward?

A. She might not. She would not draw that much water when she is empty.

Q. We are speaking now when she does draw it. Her bow won't swing around when she is drawing 10 feet forward as when she is drawing 4 feet forward, will it? A. No, I don't think so.

Q. Where was this experiment conducted, out here in the bay?

A. In San Francisco Bay, opposite the Union Iron Works.

Q. This side of the Union Iron Works?

A. No, just about abreast; we would go by it and then go back again.

Q. Where were you running your vessel, parallel to the shore line, to the docks?

A. Between the ships that were anchored on both sides, we were going fair with the tide.

Q. Going fair with the tide?

A. As near as I could judge, the way the ships were lying.

Q. Were you running with it or against it?

A. Both ways.

Q. In one case the tide was right astern of you?

A. Yes.

Q. And in the other case you were heading unto the tide? A. Yes.

Q. Now, would not the movement of your vessel, the turning of your vessel be affected as soon as the tide caught her on one bow or the other?

A. It might affect her a little.

(Testimony of G. Peterson.)

Q. Don't you know as a matter of fact that it does affect her?

A. It don't seem to affect her when it is slack water. The second experiment was in slack water.

Q. Doesn't it affect it? A. No.

Q. When you are landing your steam schooners alongside the docks down where they are tied don't you have to reckon on the tidal conditions when you make your landing? A. Yes.

Mr. DENMAN.—I object to the question as not a fair question because on your landing at the docks you have slack water [626] inside the dock, whereas in the open bay you are swinging in the current itself.

Mr. CAMPBELL.—I suggest that you go down and look at the piling.

Mr. DENMAN.—There is always slack water around the piling, a big difference between that and offshore.

Mr. CAMPBELL.—Your observation has not been correct.

Q. Don't you in landing your vessel alongside the dock take into consideration the sweep of the tide and its turning effect upon your vessel?

A. To turn the vessel?

Q. The effect of the tide on your vessel, don't you have to take that into consideration when landing alongside the dock? A. Yes.

Q. Now, a current will affect the turning power of your vessel if it catches you on one bow or the other? A. Well—

(Testimony of G. Peterson.)

Q. (Intg.) Answer the question. The current, tide, the river current will affect the turning power of your vessel if it catches it on one side or the other of the bow, will it not?

A. It will affect it a little; yes.

Q. You were not on board of the "Necanicum" at the time of her collision with the "Beaver," were you? A. No, sir.

Redirect Examination.

Mr. DENMAN.—Q. Captain, would you say that the current that catches the bow will turn it around? Suppose the current catches the bow and the stern and the whole vessel at the same time and it simply moves along in the whole body of the current; will that make any turn on the vessel?

A. The current has more effect on the stern than on the bow.

Q. I am presuming now, Captain, that she is sitting right in the current like this; presume now that this square here represents [627] the moving current and that the vessel is sitting in it. You see?

A. Yes.

Q. And the whole thing moves. There is nothing that catches the bow or the stern but the whole current moves right along.

Mr. CAMPBELL.—Do not instruct the witness by saying that nothing catches it.

Mr. DENMAN.—I am saying there is no cross-eddy in the current, that the current moves straight head, is there anything that will turn the vessel around there?

(Testimony of G. Peterson.)

A. The current will have an effect on the whole ship.

Q. And the ship will move right along with it?

A. Yes.

Q. When you are coming into a dock, alongside a dock, how do you utilize the current to swing the vessel?

A. You have got to watch the way she swings; you have got to watch how the ship swings. Sometimes there may be an eddy that pulls the bow in and moves the stern out—you can't go by the currents around the docks; every dock you ever come to has different currents, different effects on the ship.

Q. What was the condition on the day that this experiment was made?

A. The last experiment that was made it was slack water.

Q. I am talking now about the condition of the day, as to heat, as to whether it was a hot day.

A. Yes, it was a warm day.

Q. Was it that hot day last Tuesday? A. Yes.

Recross-examination.

Mr. CAMPBELL.—Q. When was the second experiment made? A. Right off Long Wharf.

Q. Oakland Long Wharf? A. Yes.

Q. Where you get the influence of the Sacramento River, don't you, on slack water?

A. The tide runs in a different direction at Long Wharf; it runs right across the end of the pier, when the tide is running. [628]

Q. When was it slack water—at what time was it,

(Testimony of G. Peterson.)

on the high or low? A. It was on the high.

Q. High slack water?

A. On the high slack water.

Q. You came down there in the influence of the Sacramento River waters?

A. I went up and I came back; I went both ways.

Q. Who was on board on the second experiment?

A. Mr. Falls, the superintendent.

Q. Was not Mr. Denman and all your lawyers there the second time? A. No.

Q. Now, Captain, supposing that you were running this steam schooner along the wharves of San Francisco against an incoming flood tide and you should stop your engines, would not your vessel swing around so that she would be across the tide or would she drift up the bay with this light bow pointing toward the tide?

A. If there was any wind she would swing around, her light bow would swing around.

Q. If there was no wind at all wouldn't that light bow swing around? A. No.

Q. She would remain pointing to the northward, if she stopped one point to the northward?

A. You always have headway.

Q. I am speaking of when she begins to drift backwards when she has lost headway from the current, won't that swing her around?

A. It all depends on the wind.

Q. Wouldn't it swing around without any wind?

A. I don't know; I never tried it.

Mr. DENMAN.—You are presuming with power

(Testimony of G. Peterson.)

applied or dead in the water?

Mr. CAMPBELL.—My question is clear.

Mr. DENMAN.—It is not clear whether with power applied or not.

Mr. CAMPBELL.—When dead in the water, is the power applied? [629]

Mr. DENMAN.—She might have a swinging effect if power was applied; she might have momentum, drifting.

Mr. CAMPBELL.—Q. Over near Long Wharf is where the tide sweeps down in eddies around Angel Island; there is a pretty strong tide around Oakland Long Wharf?

A. A strong tide when the tide is running; yes.

Q. It is on that shore of the bay that you come within the influence of the Sacramento River waters on high water, isn't it?

A. I don't know. I kept right in the center, between the island and the wharf.

Q. What day was that? A. That was Friday.

Q. What was the wind? A. It was a light air.

Q. There was some breeze, was there not?

A. A very light air.

Q. But there was some breeze, was there not?

A. It was air. I don't know what you would call it. We used to call it air when you can't feel it. You can't feel it unless you go against it.

Q. What day was that on? A. Friday.

Q. What time of the day?

A. At about 10 o'clock.

Q. What time was it high water that day?

(Testimony of G. Peterson.)

A. It is high water at Fort Point something like a quarter-past 9.

Q. What time did you make this experiment?

A. The tide is half an hour later at Long Wharf, or about 31 minutes.

Q. What time did you make your experiment?

A. 10 o'clock—about 10 o'clock.

Q. So the tide was still running flood, was it not?

A. It was high slack water.

Q. How do you reconcile your statement that Oakland Long Wharf was 31 minutes later and it was at 9 o'clock at Fort Point high water? [630]

A. The tide was half an hour later at Long Wharf, maybe 31 or 32 minutes.

Q. It is high tide at Fort Point at 9 o'clock?

A. It was 9:15 or 9:17, I think, on that day.

Further Redirect Examination.

Mr. DENMAN.—Q. Now, Captain, you have had some experience on the “Necanicum”?

A. Yes, sir.

Q. What would you say from your experience with the “Necanicum,” apart from these experiments as to her tendency to turn to starboard or port in the event that you applied a full speed astern wheel when going full speed ahead?

Mr. CAMPBELL.—Full speed ahead at what rate?

Mr. DENMAN.—150 pounds of steam.

Mr. CAMPBELL.—At what rate of speed?

Mr. DENMAN.—Say 8 knots, between 8 and 8½ knots.

(Testimony of G. Peterson.)

Mr. CAMPBELL.—Q. Did you ever try it, Captain? A. I don't understand.

Mr. DENMAN.—Q. Have you ever put your vessel at full speed astern from full speed ahead when you were going at $8\frac{1}{4}$ or $8\frac{1}{2}$ knots on the "Necanicum"? A. No.

Q. Before the experiments?

A. I tried it in the bay about 3 or 4 months ago with a breeze of wind.

Q. Couldn't get anything out of her on account of the breeze?

A. She acted about the same, unless the wind would catch the bow, she would fly around; but the time of stopping was about the same with the tide and against the tide.

Mr. DENMAN.—Now, we renew our offer to turn the boat over to our opponents at any time this week, or if there is any question about the experiment and the Court desires an inspection, why we can have an experiment inside the heads or outside, or elsewhere. [631]

Recross-examination.

Mr. CAMPBELL.—Q. Captain, I understand that you tried three experiments on this vessel before you could get a result.

A. No. The first time we tried it there was too much wind. We did not think we could get it correct.

Q. Who told you you did not get it correct the first time?

A. Nobody told me it was not correct; he said the

(Testimony of G. Peterson.)

experiment would not do because there was too much wind.

Q. Who told you that, the lawyers? Who told you it would not do, the lawyers? A. No.

Q. Mr. Denman or Mr. Burnett? A. No.

Q. Who told you?

A. He said to try it over again.

Q. Who told you to try it over again?

A. One of the men.

Q. One of the officers of the company?

A. Well, he was with me during the time we had the experiments.

Q. One of the officers of the company told you to do it over again?

A. No. I had orders—Mr. Denman came aboard and he says “We will try the experiment.”

Q. Over again?

A. Because he was not along the first time and he said there was too much wind that day.

Q. Who said so, Mr. Denman?

A. He didn't tell me exactly, but that is what I understood.

Q. To whom did Mr. Denman say there was too much wind? A. I don't know.

Q. Did Mr. Jones or Mr. Falls tell you that Mr. Denman had said there was too much wind?

A. He didn't say he said it; he said, “We have got to try it again.” I don't remember how it was.

Q. Who was it that told you there was too much wind on the first day, that you had to try it over again? [632]

(Testimony of G. Peterson.)

Q. Mr. Falls or Mr. Jones, which?

A. I don't remember who it was.

Q. One or the other, was it not?

A. I think so; I ain't sure who it was.

Further Redirect Examination.

Mr. DENMAN.—Q. How heavy a wind did you have on that first day?

A. It was a strong breeze, blowing a strong breeze, and we couldn't get away from Oakland Long Wharf—from Taylor's Wharf there without a launch.

Mr. DENMAN.—That is all.

Mr. CAMPBELL.—That is all.

Testimony of R. B. Seike, for Claimant.

R. B. SEIKE, called for the claimant, sworn.

Mr. DENMAN.—Q. Mr. Seike, what is your occupation? A. Master mariner.

Q. You are now in the employ of the Hammond Lumber Company? A. Yes, sir.

Q. And have been for sometime? A. Yes.

Q. Were you ever employed on the steamship "Beaver"? A. Yes, sir.

Q. How long ago?

A. About two years ago.

Q. In what capacity? A. Chief officer.

Q. How long were you on her? A. Two years.

Q. Making voyages up and down the coast?

A. Between Portland, San Francisco and San Pedro.

Q. Presuming, now, that she has the ordinary trim that she has on the average run, laden so that

(Testimony of R. B. Seike.)

she will steer at her best, presuming that she is going at 14.7 knots an hour, and that the following orders are given and executed as quickly as possible: "Port for 30 seconds; hard aport for 20 seconds; full speed astern for 30 seconds." How many points, in your opinion, would she go over during that period of time toward her starboard? [633].

A. That would be about a minute altogether, would it?

Q. That would be a minute or a minute and 5 or 10 seconds?

Mr. CAMPBELL.—A minute and 20 seconds.

Mr. DENMAN.—Q. A minute and 20 seconds, how far would she go over?

A. She would go 4 points, 4½ points, something like that.

Cross-examination.

Mr. CAMPBELL.—Q. You never have actually tried it out with those times, have you?

A. Not in regard to that time; no.

Redirect Examination.

Mr. DENMAN.—Q. How much would she go over without any reversing at all in that time? Say she runs for 30 seconds on a port helm and for 30 seconds on a hard aport helm, in a minute?

A. About 4 points.

Q. Let me ask you: she is a passenger-boat, isn't she?—The "Beaver"? A. Yes.

Q. What can you say as to her tenderness? Is she a very steady boat like a deep cargo carrier or is she tender?

(Testimony of R. B. Seike.)

A. Well, that depends largely upon the cargo. With a cargo of paper, of course she would be a little more tender with paper than with grain.

Q. It depends then upon how the vessel is stowed?

A. A good deal on how she is stowed.

Q. Is a passenger vessel of that type as steady as a regular cargo-carrier with deck-houses and upper works?

A. No; the upper house and so forth, structure it is bound to make it a little more tender than the ordinary cargo ship.

Recross-examination.

Mr. CAMPBELL.—Q. Isn't that offset, (Mr. Seike, by the greater weight of engines and boilers necessitated by high power and double bottom structure?

A. Well, usually the double [634] bottom raises that boiler and engine up.

Q. Double bottom carrying fuel-oil—isn't the increased weight on the top of the house of the vessel offset by the greater weight of boilers and greater weight of machinery due to her being a high power and high speed vessel, when you come to make a comparison with the ordinary tramp?

A. Well, of course she would carry more power than the ordinary tramp, but with the double bottom ship, it is probably raised up 5 feet.

Q. Assuming that she is carrying oil in that?

A. Well, if she is full of oil, probably that would offset it.

Q. That is all guesswork on your part, isn't it,

(Testimony of R. B. Seike.)

about this tenderness?

A. Well, it is not scientific.

Q. What kind of a whistle has the "Beaver" got, a deep base whistle? A. It is quite deep.

Q. And one that has a good resonant tone, a whistle that sounds loud?

A. It is a pretty good whistle; yes.

Q. You don't know of any better on the coast, do you?

A. It would be hard to say whether they are better or worse.

Mr. DENMAN.—I offer in evidence the depositions of Captain Keegan and George A. Olson.

Mr. CAMPBELL.—Mr. Denman, there has been something said during the case about the Hammond Lumber Company. Will you admit that the Hammond Lumber Company is the owner of the stock of the Leggett Steamship Company?

Mr. DENMAN.—I don't know whether it is, or not.

Mr. CAMPBELL.—Mr. Burnett would probably know.

Mr. BURNETT.—The management would be identical.

Mr. CAMPBELL.—The Hammond Lumber Company is interested in the Leggett Steamship Company through stock ownership, is it not? [635]

Mr. BURNETT.—A. Hammond Lumber Company is.

Mr. CAMPBELL.—The interests are all the same.

Mr. DENMAN.—For your purposes it will be ad-

mitted that the management and interests are the same.

Mr. DENMAN.—I also offer the deposition of Walter N. Beckwith. Have you that statement, Mr. Burnett?

Mr. BURNETT.—Yes.

Mr. DENMAN.—There it is, Mr. Campbell.

Mr. CAMPBELL.—I will offer this statement in evidence as part of the cross-examination of the quartermaster here on the stand, Christensen.

(The statement is marked "Libelant's Exhibit 16.")

Mr. DENMAN.—I desire to make a statement: I desire to be sworn.

Testimony of William Denman, for Claimant.

WILLIAM DENMAN, called for the claimant, sworn.

The WITNESS. —Christensen was not seen or interviewed by me until Wednesday of last week. At that time he came to my office and seemed to be suffering from the effects of a debauch. He said nothing to me of any of the occurrences in Mr. Campbell's office, and his statement of the case varied in no respect that I can recall from the statement of the case made by him on the stand here. From his first statement he included the order hardaport which apparently was the order he is alleged to have said the Captain told him not to mention.

The COURT.—One whistle, was it not?

Mr. CAMPBELL.—Yes.

Mr. DENMAN.—I think not.

The COURT.—My recollection of his testimony is

that he [636] did not say anything about one whistle.

Mr. DENMAN.—I have no recollection of that particular element of it but the order to port which I understood was the question about which there was a dispute was in his first statement to me, and had already been in evidence for 4 or 5 months in the statement of Captain Keegan.

The COURT.—I may be mistaken.

Mr. DENMAN.—In the deposition of Captain Keegan my recollection is that was in reference to the whistle.

The COURT.—Maybe. The thing I had in mind particularly was the “My God! Don’t say anything about it,” or something to that effect.

Mr. CAMPBELL.—That was about the whistle.

Mr. DENMAN.—My recollection is that Captain Keegan’s deposition also refers to the whistles, but of that I am not certain.

Mr. CAMPBELL.—Captain Keegan’s deposition I think is to the effect that only two whistles were blown from his vessel and he heard the whistle from the “Beaver” and that the next whistle from his vessel was the three whistles and that no answer was given by his vessel to the one whistle.

Mr. DENMAN.—However that may be as to the whistles the order to the helmsman, which I say alone concern the movements of the vessel were executed as he testified to yesterday. There has never been a suggestion from him that any other condition prevailed on the vessel or any other act was done than

(Testimony of Peter Christenson.)

what he swore to here on the stand, and which I understand is not claimed by our opponent.

Mr. CAMPBELL.—The record will have to speak on that.

Mr. DENMAN.—That is my understanding at this time. Mr. Campbell, do you raise any question about the man's intoxication [637] on that day?

Mr. CAMPBELL.—The day he came to see me?

Mr. DENMAN.—Yes.

Mr. CAMPBELL.—Mr. Denman, I don't think the man was intoxicated.

Mr. DENMAN.—Do you know how many drinks your man had bought him in the meantime?

Mr. CAMPBELL.—No, I do not.

Mr. DENMAN.—I think we will have to put him on the stand.

Testimony of Peter Christenson, for Claimant.

(Recalled).

PETER CHRISTENSON, recalled.

Mr. DENMAN.—Q. Just sit down there, Mr. Christenson. I want to ask you a little more fully about that day that you went to the Portland Steamship Company's office. You remember that, don't you? When did you come to town before that, when did you arrive in San Francisco?

A. Why, I came on the "Necanicum."

Q. That morning?

Q. She got in Monday night, didn't she?

Q. She got in Monday night? A. Yes.

Q. Where did you go Monday night?

A. Well, I went up on the Barbary Coast.

(Testimony of Peter Christenson.)

Q. And you came back to the ship in the morning?

A. Tuesday morning?

Q. Tuesday morning?

A. I came back about 10 o'clock, somewhere along there.

Q. Still having the effects of the coast on you?

A. A sore head.

Q. What happened then between yourself and the captain? A. That day? [638]

Q. That morning, Tuesday morning. What dispute did you have with the Captain?

A. Well, I wanted to go away and he would not let me.

Q. Did you leave, did you go away? A. Yes.

Q. What did you do then? How many drinks did you have then? A. Well, I had a good many.

Q. Then where did you go?

A. Back up on the coast.

Q. What time of the day did you go to the San Francisco & Portland Steamship Company's office?

A. I don't know.

Q. You don't know?

A. No. The last I remember is when I left the coast; I remember that, but I don't remember any more.

Q. After you got to the steamship company's office, you stayed there awhile, didn't you?

A. I guess I did. If I went there I must have stayed there.

Q. Then after you left there where did you go?

A. I don't know, sir.

(Testimony of Peter Christenson.)

Q. Did you go to Mr. Campbell's office, or was that in the evening?

Mr. CAMPBELL.—Point to me. He don't know my name.

Mr. DENMAN.—Q. Mr. Campbell's office, did you go to this gentleman's office?

A. I don't understand.

Q. After you left the steamship company's office were you taken over to Mr. Campbell's office by somebody from the steamship company's office?

A. There was some one took me over there.

Q. Did you have any drinks on the way over?

A. I remember of having a drink, but I don't remember whether it was on the way over or on the way back.

Q. You had a drink with this man? A. Yes.

Q. How many did you have with him?

A. I remember having one.

Q. Can you recall having any more? A. No.

Q. Did you see Mr. Campbell in the afternoon or in the evening? [639]

A. Well, that I don't know; it must have been in the evening, because it was on the next day—I was sober the next day.

Q. Was it the next day you came to my office?

A. Yes.

Q. Had you ever seen me before that?

A. Not that I remember of.

Cross-examination.

Mr. CAMPBELL.—Q. Your memory is clear up to the time that you went to the San Francisco &

(Testimony of Peter Christenson.)

Portland Steamship Company's office, isn't it?

A. No, I don't know.

Q. Now, do you remember on Tuesday morning how many drinks you had in the morning?

Mr. DENMAN.—He didn't say he remembered.

A. I don't remember.

Mr. CAMPBELL.—Do you remember taking a drink at all Tuesday morning?

A. Well, Tuesday morning was the morning after the arrival of the boat, was it not?

Q. You ought to know.

Mr. CAMPBELL.—I think, Mr. Denman, under the conditions of this case, that you ought to refrain from suggesting.

Mr. DENMAN.—There is not any question about that.

Mr. CAMPBELL.—Yes, this man's memory, that is under test now.

Mr. DENMAN.—I beg your pardon; I did not realize that.

Mr. CAMPBELL.—Q. Do you know how many drinks you had Tuesday morning?

A. No, I don't know.

Q. You remembered yesterday when I asked you about this—you remembered then distinctly going to the San Francisco & Portland Steamship Company's office, didn't you?

A. I remembered it after you told me.

Q. After I told you it brought it back to you?

A. It partly came back to me. [640]

Q. You remembered coming to my office yesterday

(Testimony of Peter Christenson.)

when I called it to your mind—you remembered coming to my office?

A. Well, I remembered going somewhere.

Q. Remembered going somewhere? A. Yes.

Q. Don't you remember when I asked you how far your vessel had swung in her course under your starboard helm you said to me that she swung south of west—don't you remember my taking out of my desk one of these compass-cards and laying it down on the top of my desk and taking little bottles and asking you to show me how she swung?

A. No, I do not.

Q. You don't remember that? A. No.

Q. What was it that could have been in your mind—what was it that could have been on your mind, that led you to say that the Master had said "My God! Don't say anything about that," referring to one whistle which he blew when he ordered your helm hard aport? What was it that was on your mind that led you to make that statement?

A. I could not tell you. I don't know whether I made the statement, or not, because I never heard the one whistle.

Q. Why did you go to the company's office?

A. I don't know. As I told you I was full of whiskey.

Q. Didn't you say yesterday you went there because you wanted to tell the truth and you wanted the advice of the company as to telling the truth?

A. That is what I had got on my mind all the time.

Q. To tell the truth? A. Yes.

(Testimony of Peter Christenson.)

Q. You wanted the advice of the owners of the "Beaver" as to how to tell the truth?

A. Not advice from them any more than I wanted advice.

Q. Do you remember saying that you were disposed to leave town and go back home to Eureka and not appear in this case? [641] A. Sir?

Q. Do you remember saying that you were disposed to leave town and go back to your home in Eureka and not appear as a witness in this case?

A. That I proposed to do that?

Q. Do you remember saying that you wanted to do that? A. No.

Q. Where was your vessel—at Pier 27, was it not?

A. What?

Q. Where was your vessel lying, at Pier 27?

A. Tuesday morning?

Q. At Pier 27, yes? A. No.

Q. Where? A. Down at Sixteenth Street.

Q. Down here at the waterfront?

A. No, down there at the oil-tanks.

Q. Down at the oil-tanks?

A. Well, down where she used to take oil.

Q. Where was it this night: where did you go back to her that night, Tuesday night?

A. I did not go back to her on Tuesday.

Q. Did you stay on the Barbary Coast Tuesday night? A. Yes.

Q. Then, Wednesday morning you went to Mr. Denman's office after two nights on the Barbary Coast?

(Testimony of Peter Christenson.)

A. I think you misunderstand me, I said I went to the Barbary Coast on Monday night.

Q. Where did you go on Tuesday night?

A. Well, Tuesday night I found myself on the waterfront in some lodging house.

Q. You went to some lodging house? A. Yes.

Q. When did you join your ship again?

A. I have not been on her at all since.

Q. You have not been on her?

A. No, I have not been on the boat, only that one time. [642]

Q. Who have you talked with about this instance in court since yesterday? A. Since yesterday?

Q. Yes.

A. I did not talk with anybody that I know of except Mr. Sullivan.

Q. Who is he?

A. He is a man working for the company, I guess.

Q. For the company? A. Yes.

Q. A superintendent?

A. Well, he has a job, he has a foreman's job.

Q. What has he said to you since yesterday about this?

A. He asked me the same questions that you ask me.

Q. Now? A. Yes.

Q. Is he the man that hires you? A. No.

Redirect Examination.

Mr. DENMAN.—Did this gentleman, at Mr. Campbell's office try to get some sort of a statement from you? Was that it?

(Testimony of Peter Christenson.)

A. I do not know. I could not say about that. my mind was pretty badly bewildered that day.

Q. You do remember though that you were mad at the Captain?

A. I am mad at him yet as far as that goes. [643]

Mr. CAMPBELL.—Before I forget it, if the Court, please, I should like to offer in evidence the deposition of Captain Pillsbury, which was taken the other night, together with the exhibits. And also I offer in evidence as a part of my cross-examination of the master and first officer of the “Necanicum” the official log of the vessel.

Testimony of H. W. Deans, for Libelant (in Rebuttal).

H. W. DEANS, called for the libelant in rebuttal, sworn.

Mr. CAMPBELL.—Q. Mr. Deans, I want you to take a look at this man (Referring to Peter Christensen).

Mr. DENMAN.—Q. Just a moment. Mr. Deans, you have been in the courtroom for the last half hour, have you not? A. No, sir; I have not.

Q. You were here yesterday?

A. Yes, sir; I was here yesterday.

Q. You heard all the testimony of this man in the courtroom yesterday morning?

A. No, sir; I did not. I did not hear his testimony. I was not here in the morning, I was only here in the afternoon, at half-past two or three o'clock I got here. It was my fault, though, Mr. Denman, that I was not here, I intended to be here.

(Testimony of H. W. Deans.)

Mr. CAMPBELL.—Q. What is your position with the San Francisco & Portland Steamship Company?

A. Assistant general manager.

Q. Do you recognize this man who just came in here? (Referring to Christensen.) A. Yes, sir.

Q. Do you remember bringing him to my office one day last week?

A. Last Tuesday, a week ago, a week ago the day before yesterday.

Q. I want you to tell the Court absolutely everything that transpired according to your best recollection, of that man coming to [644] your office, and your bringing him to my office, and what was said in my office, and where you left the man after you went with him from my office.

Mr. DENMAN.—I object to this method of interrogation. If this is to impeach that witness, the questions, that were put to the witness specifically should be put to this witness, after laying the proper foundation.

The COURT,—That is the method.

Mr. DENMAN.—I do this particularly in this case in view of the condition of the man, and what the evidence shows happened to him.

Mr. CAMPBELL.—Q. When did you first see this man, Christensen?

A. In my office.

Q. Where is your office?

Mr. DENMAN.—What page are you taking that from, Mr. Campbell?

(Testimony of H. W. Deans.)

Mr. CAMPBELL.—I am not taking it from the transcript; this is a preliminary matter.

Q. Where is your office? A. 722 Market Street.

Q. Had you ever seen him before he came there?

A. No, sir.

Q. Did he come under any solicitation on your part? A. Absolutely none.

Q. Did you send anyone to bring him to your office? A. No, sir.

Q. Did you know there was such a man as Christensen in being prior to his coming there?

A. No, sir.

Q. Did you in any way have anything to do with his coming to your office? A. No, sir.

Q. Did you afterwards bring him to my office?

A. Yes, sir, immediately.

Q. 1107 Merchants Exchange? A. Yes, sir.

[645]

Q. Were you in the office during the entire time that this man was there? A. Yes, sir.

Q. Did you leave my office with the man?

A. Yes, sir.

Q. Where did you go with him after that?

A. I took him to the corner, or, rather, accompanied him to the corner of Bush and Montgomery and put him on a seawall car, bound for his ship.

Q. Where did he say his ship was lying?

A. Pier 27. That is the seawall pier now.

Q. Where does the seawall car run to with respect to Pier 27? A. Right at it.

Q. I will ask you whether or not in your presence,

(Testimony of H. W. Deans.)

in my office, this man Christensen said that Captain Keegan—

Mr. DENMAN.—What page is that, Mr. Campbell?

Mr. CAMPBELL.—Page 315. Q. (Continuing.)—said to him, “My God! Don’t say anything about that,” referring to the “Necanicum” giving a one-blast passing signal in answer to the “Beaver’s one-blast passing signal.

Mr. DENMAN.—I object to that because it does not appear here that the one was given in answer to the other.

Mr. CAMPBELL.—We will strike that out, then, we will strike out the part in answer to that.

A. He said that the captain had made this remark in the presence of himself and also of another member of the crew, and I believe in the presence of the first officer. That is the best of my recollection.

Q. Will you say whether or not Christensen said, in response to a question by me as to how far his vessel swung to port under a starboard helm, that he said that she swung so that she was heading south of west? A. That is what he said; yes, sir.

Q. I ask you whether or not you recall my taking from a [646] drawer in my desk a compass card, such as I hold in my hand, laying it on the top of my desk, taking a small celluloid model and asking him to show me how his vessel swung under her starboard helm? A. Yes, sir.

(Testimony of H. W. Deans.)

Q. Can you say whether or not he showed me that, or did not show it to me?

A. I was watching him at the time; yes, he showed it to you.

Mr. CAMPBELL.—I offer this in evidence so that I may refer to it.

(The compass card was here marked "Libelant's Exhibit 17.")

Q. I ask you whether or not you recall this witness saying to me in my presence that the collision would not have occurred if he, Captain Keegan, had not taken it—the helm—out of Beckwith's hands and ordered the helm hard aport and blown the one whistle.

A. He made that statement, yes; he said the vessels would have cleared.

Q. I ask you whether or not you heard him, in my presence, make the statement that he wanted to tell the truth about this case?

A. He made that statement to me and to you. He made that in my office first and to you afterwards. I might amplify that: He also stated he had discussed the problem with his wife, before he left Eureka, his home, the last time he was there, and she had advised him not to tell anything about it, that he was doing this on his own initiative and against the best wishes of his wife.

Mr. CAMPBELL.—Now, Mr. Denman, I turn Mr. Deans over to you for unlimited cross-examination.

Mr. DENMAN.—I think I would be entitled to it

(Testimony of H. W. Deans.)

without your gift, although I thank you for the privilege.

The COURT.—What is that?

Mr. DENMAN.—I say I think I would be entitled to cross-examine [647] him at length, anyway.

The COURT.—Maybe not at this particular moment.

Mr. CAMPBELL.—There is one other question I want to ask:

Q. At what time of day was this?

A. It was about 4:30 when he came into my office, I believe. It was possibly about a quarter to five when I got him to your office.

Cross-examination.

Mr. DENMAN.—Q. Are you a navigator?

A. No, sir.

Q. Have you ever been a navigator? A. No, sir.

Q. How many points are there to the compass?

A. I couldn't tell you, I presume there are 360, though.

Q. This southwest direction that he spoke of was a novelty to you. A. Oh, no.

Q. You knew what southwest was, did you?

A. He did not say southwest, he said south of west. I recollect distinctly the language that he used.

Q. And he just volunteered that voluntarily?

A. He volunteered the information.

Q. Nobody asked him anything about it?

A. No.

Q. It just came right out of his head, he said she

(Testimony of H. W. Deans.)

swung south of west

A. Mr. Campbell asked him very few questions; he volunteered all the information himself. Mr. Campbell did not ask him anything about this compass, only to make him prove his own statement, that he was going to tell the truth.

Q. When he said he was going to tell the truth, Mr. Campbell handed him this and asked him what direction she swung? A. Yes, sir.

Mr. DENMAN.—Mr. Campbell, you can turn now to page 314.

Q. What he said was that he had discussel with Captain Keegan the fact that he took command of the vessel out of Beckwith's hands and gave the order hard aport? A. Yes, sir. [648]

Q. And it was this giving of the order hard aport and taking the vessel out of Beckwith's hands that constituted the fault that he was going to disclose?

A. Yes, sir.

Q. You remember that, do you, accurately?

A. Yes, sir.

Q. Did you recognize how that constituted itself a fault? A. I had my own opinion about it.

Q. How would that constitute itself a fault?

A. Keegan threw his helm hard aport, throwing the ship to starboard and at the same time backing.

Q. What effect would that have on the ship?

A. I have not the slightest idea.

Q. Why do you think that was an error?

A. From the statement of the man, more or less, who is a navigator.

(Testimony of H. W. Deans.)

Q. What is that?

A. From the statement of the man, who is a navigator, or a seaman, familiar with the sea, and what vessels will do under certain conditions.

Q. What would be the effect of that maneuver, do you know? A. I have not the slightest idea.

Q. Don't you know the effect of that maneuver would be to prevent the point of collision being amidships and bring it up toward the bow?

A. No, I do not.

Q. Don't you know the effect of that movement would be to clear the two vessels?

A. Mr. Denman, I said I was not a navigator; I have not the slightest idea what the action of the sea or the action of the rudder will have on a ship excepting that a rudder thrown to port will throw the vessel to port and a rudder thrown to starboard will throw the vessel to starboard.

Q. And this man seemed to think there was some error in that? A. Yes, sir.

Q. And that Captain Keegan had requested him to suppress the fact that he had taken the command out of Beckwith's [649] hands and put the vessel over in the opposite direction? A. Yes, sir.

Q. That is all there was to it in the way of error?

A. I don't say in error; that is the way he considers it. I don't consider it, I don't have any opinion on it, one way or the other.

Q. But that is all he told in the way of an incriminating story against the ship

A. Yes, that was all.

(Testimony of H. W. Deans.)

Q. Did he say when this conversation occurred between himself and Keegan?

A. Immediately following the collision.

Q. Did he say whether or not he had given that testimony before the United States inspectors in the same form he gave it here?

A. By "here," where do you mean?

Q. In court, here.

A. I do not know; he had not given it in court at that time.

Q. No, but I mean as it was given in court yesterday?

A. I have not seen his testimony; I don't know what he testified in court.

Q. What did he say about his statement before the United States Inspectors?

A. He had very little to say about it; I don't recollect that he said anything about it.

Q. He didn't say anything about that at all?

A. He said he appeared down there, that was all.

Q. Don't you know that that statement is exactly the same as the statement that he made to you in Mr. Campbell's office?

A. No. I did not see his statement in court. We have not had the pleasure of seeing those statements that were made—

Q. (Intg.) That trial is over, they are open, you know. A. At the Customs-house?

Q. They are open now.

A. We were informed that they were not open.

(Testimony of H. W. Deans.)

Q. When the trial is closed, when the two captains were acquitted, then it was proper for you to have them. A. We were informed to the contrary.

Mr. CAMPBELL.—The regulations prescribe that that testimony shall not be given out to anybody; that it was a secret hearing. There was no trial held by these inspectors as the rules prescribe.

The WITNESS.—Captain Bulger refused us a copy of the testimony.

Mr. DENMAN.—That is a novelty to me. I have always had a copy of the testimony there openly, I have used it in the cases I have tried. I never knew of a case where they refused to give them out.

Mr. CAMPBELL.—Up to the time of the “Beaver”—“Selja” case the testimony was given out. I believe that counsel were allowed to be present at all hearings. But at sometime about that time they made a new regulation from the department which requires the inspectors to hold a private hearing, a preliminary hearing, for the purpose of deciding whether or not there is any evidence upon which to prefer charges against navigating officers. The rules prescribe that that testimony shall not be given out. If they find there is *prima facie* ground for a charge that charge shall be preferred in writing, a public trial held, at which counsel may be present to represent the accused, and a copy of the testimony taken at that hearing shall be furnished free of expenses to the accused upon his application. That is the only testimony that is provided for by the regulation

(Testimony of H. W. Deans.)

which can be made public. The testimony taken on the preliminary hearing cannot be made public. My recollection is that there was no trial of these men, there was no trial at which counsel were [651] permitted to be present before the board of inspectors.

Mr. DENMAN.—Your understanding is that the testimony is to be made public and a copy of it given to the accused in the event of trial?

Mr. CAMPBELL.—No, sir; the testimony taken on the public trial, when he is represented by counsel, a copy of it shall be furnished to him free of expense. That is all prescribed in the rules. I suppose that is so he can have the benefit of that testimony if he desires to lodge an appeal to the supervising inspector, or to the general supervising inspector. Those rules are prescribed. There was that change along about the time of the “Selja” case.

Mr. DENMAN.—I think that is all.

Redirect Examination.

Mr. CAMPBELL.—Q. The witness testified you took him out and bought him drinks, is that true?

A. It is true to some extent; he wanted to buy me one and I would not stand for it. I didn't want to take that character of a man—not that character of a man, but I would not want to have that class of a man go into any cafe on Market Street and buy me a drink, so I bought him a drink.

Q. Where was the drink bought?

(Testimony of H. W. Deans.)

A. At Harry Flannery's, on Market Street and Kearny.

Q. How many drinks were bought? A. One.

Q. And what was it? A. He took whiskey.

Q. What would you say as to whether or not he was intoxicated when he came to my office?

A. I should say that he was not intoxicated. It was more a disordered mind, due to the fact that on that morning he claimed to have had a run-in with his commander, and was very much exercised about it and generally upset [652] over that condition.

Mr. DENMAN.—Q. His mind was so disordered that he insisted upon you, the assistant manager of that company, having a drink with him, and he was so insistent, and you didn't want to make a scene, and you went into Harry Flannery's, and he had what would be in his language a "slug of whiskey"; that is correct, is it?

A. That is right.

Mr. CAMPBELL.—That is all, your Honor.

Mr. DENMAN.—I think there is one exhibit I want to put in; that portion of the report of Mr. Evers to the company, which reads as follows: "Extract from deck log describing the injury to the "Beaver":

"Cutting in about three feet from about four feet above water-line to fore-castle-head crushing port hawse-pipe, bending deck beams in upper, main and orlop decks, cracking several plates in port bow, several frames in port bow and sprung plates in starboard bow, started fore-

castle-head and carried away rails, fittings," etc.

This is what purports to be an extract from the log of the vessel as found by Mr. Evers at the time he made this report to the company.

The COURT.—Is that a variance from the log as it now exists?

Mr. CAMPBELL.—I don't know. That is just what I want to see now, your Honor.

The COURT.—Have you compared it at all?

Mr. DENMAN.—It is not in the log in evidence.

Mr. CAMPBELL.—I will read the entry in the log:

"At about 2:14 P. M. sighted a steamer right ahead, about a mile off,"— [653]

Mr. DENMAN.—Are you reading from the log in evidence?

Mr. CAMPBELL.—I am reading from the official log. If it is not in evidence, Mr. Denman, it is because you have not put it in, and I have not the right to do so. I will put it in if you permit me.

Mr. DENMAN.—I am objecting to this as evidence in the case as to what happened; if he desires to read the log entry for the purpose of a comparison, that is all right.

The COURT.—I understand that is the purpose.

Mr. CAMPBELL.—I am not reading it so as to get it into evidence in this way. Didn't you Mr. Denman, compare this with the log when you asked me to hand you the original?

Mr. DENMAN.—No, I was doing something else. I want to bring in the statement concerning the crushing of the port hawse-pipe.

Mr. CAMPBELL.—I would like to read the log, as long as I have not the right to put it in evidence.

Mr. DENMAN.—You say you would like to read it in?

Mr. CAMPBELL.—I would like to read it in for the purpose of comparing this portion of it.

“At about 2:14 P. M. sighted a steamer right ahead, about a mile off; blew one blast of whistle and put helm aport, whistle was not answered and about 30 seconds later blew one blast which was answered but as steamer seemed to be swinging on a starboard helm at 2:16 P. M. put engines full speed astern at same time blowing three short blasts, which were not answered by steamer, which proved to be the ‘Necanicum.’

“With helm hard aport and engines going full speed astern, ship swung about 2 points to starboard and at 2:18 the ‘Necanicum’ struck ‘Beaver’ at almost right angles 12 feet abaft stem on [654] port bow, cutting in about three feet from about four feet above water line to forecastle-head crushing port hawse-pipe, bending deck beams in upper, main and orlop decks, cracking several plates in port bow, several frames in port bow, and sprung plates in starboard bow, started forecastle-head and carried away rails, fittings, etc.

“‘Necanicum’ immediately backed off and a few minutes later was lost in fog, the only apparent damage to her being a shattered stem. Bilge soundings showed ship not making any water. Note ”—

Mr. DENMAN.—What is this going in for?

Mr. CAMPBELL.—I am comparing the log. Is that the end of it?

Mr. DENMAN.—You have long past the portions I read. I move to strike out the portions other than what I read.

The COURT.—Let the rest go out.

Mr. CAMPBELL.—A comparison has been made and I believe it is the same that Mr. Denman read, except that the word “on” was omitted in one place. Then all after “fittings” will go out.

That concludes our case.

Testimony of A. T. Jones, for Claimant.

A. T. JONES, called for the claimant, sworn.

Mr. DENMAN.—Q. Mr. Jones, what is your position with reference to the steamer “Necanicum”?

A. I am port engineer of the Hammond Lumber Company.

Q. As port engineer, does the upkeep of that vessel fall within your jurisdiction? A. Yes, sir.

Q. Did you see the “Necanicum” after she came back from that collision? A. Yes, sir.

Q. What can you say as to the condition of her tiller? [655]

A. Her tiller, when she arrived back from the collision, the tiller was bent around to starboard.

Q. Where did that bend occur with reference to the check? A. It started from the stopper.

Q. And bent in what direction from the stopper going outward from the rudder-head?

O. To starboard.

(Testimony of A. T. Jones.)

Q. How much of a bend was that?

A. About 12 or 14 inches.

Q. At the end? A. Yes, sir.

Q. What size bar was the tiller?

A. A two-inch square bar—a three-inch square bar.

Q. A three-inch square bar?

A. Yes, sir. I have it in my note-book, the sizes of these different things.

Q. Did you make the memorandum at the time?

A. Yes, sir; a three-inch square bar.

Q. And about how far is the stopper from the head of the rudder stock? A. From the center?

Q. Yes. A. It is 23 inches.

Q. From the center of the rudder head to the center of the stopper?

A. Yes, sir; from the center of the rudder head to the center of the stopper.

Q. And how long is the tiller?

A. The tiller, from the center of the rudder head to the center of the eye—the plates that carry the sheave—is 5 feet one inch.

Q. What was the condition of the rudder?

A. The rudder was cracked right above the blade, the top of the blade, partly ways around. I think it was on the after side. I would not be positive of that. I kind of forget it. I took it out with the carpenters and then left and when I went back they had sawed this off.

Q. But there was a crack?

A. There was a crack; yes, sir. [656]

(Testimony of A. T. Jones.)

Cross-examination.

Mr. CAMPBELL.—Q. How long prior to this collision had you examined the rudder?

A. I had examined her at different times since then.

Q. No, prior to the collision; how long before the collision was the last time you had examined the rudder?

A. I had not paid any particular attention to it, there was no complaint about it before.

Q. What was there on the end of the tiller—heavy iron sheaves?

A. Yes. That is the plate, that is the center of the hole (illustrating).

Q. May we take this drawing out of your book?

A. Yes, certainly.

The COURT.—Q. Is there anything on the other page?

A. There is some data on here. I can put this on another sheet.

Mr. CAMPBELL.—If that is something you don't want us to look at, you can rub it off.

A. Oh, I don't care about it, only I will copy it on another sheet.

Q. What is rolled through the iron sheaves?

A. It is a $\frac{5}{8}$ ths chain.

Q. Just show us on the drawing, if you can, the way those chains run.

A. There is an eye-bolt anchored in the deck somewhere here, and this chain is rolled through and

(Testimony of A. T. Jones.)

around on to the chain that leads forward; the rest is an iron rod from there to the pilot-house.

Q. From just beyond the eye-bolt to the deck?

A. Yes, sir. The chain comes around here and is through this sheave and it connects to an iron bar on the deck.

Q. What would you say would be the weight of the sheave and the chain on the end of that tiller?

A. Well, I would have to guess [657] at that.

Q. What is your best judgment?

A. I would say it would weigh about 80 pounds, two sheaves and two plates, offhand.

Q. And the chain? A. About 80 pounds.

Q. And how high is the tiller off the deck?

A. About 3 or 3½ inches.

Q. So the sheave is kept off the deck?

A. Yes, sir. There is a plate on the bottom and on the top, and the sheave is in between the plates.

Q. And does this taper here?

A. It does not taper there; it tapers from this point to here.

Q. From the point "X" to the point "Y" it tapers?

A. Yes, sir; it tapers from here down. It has a sweep, the deck has a forward slant to it. I will mark it here, "Tapers down."

Q. Just mark "X" at the point where it begins to taper and "Y" where the end of the taper is.

A. The taper runs up like this. It is reduced down here, and then runs to suit the sheer of the deck.

(Testimony of A. T. Jones.)

Q. So the tiller is not straight?

A. It is not on a straight line. This is a parallel piece.

Q. It is on an inclination from the rudder stock to the stern of the vessel? A. Yes, sir.

Q. Is the tiller the same size metal all the way through, 3 by 3?

A. No. This corner is hexagon form. The corners are forged on.

Q. The stop, itself, is only 23 inches from the center of the rudder post?

A. From the center of this stopper to the center of this post.

Q. And the end of the rudder, as I understand, was bent about 14 inches.

A. About 14 inches, starting from this point here [658] and running around here.

Q. About 14 inches out of line?

A. About 14 inches out of parallel with itself.

Mr. CAMPBELL.—I offer this drawing in evidence.

(The drawing was here marked "Libelant's Exhibit 18.")

Redirect Examination.

Mr. DENMAN.—Q. Could the rudder be operated properly with that bent in that direction?

A. No, sir.

Mr. CAMPBELL.—Q. You had not seen the rudder at all for some time prior to the collision, had you? A. No, sir.

Mr. DENMAN.—That concludes our case.

(Thereupon the cause was submitted upon briefs to be filed, or possibly upon oral argument, to be determined later.)

[Endorsed]: Filed Jul. 19, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [659]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

IN ADMIRALTY—No. 15,513.

SAN FRANCISCO & PORTLAND S. S. CO., etc.,
Libelant,

vs.

The Steam Schooner "NECANICUM," etc.,
Respondent.

McCUTCHEN, OLNEY & WILLARD and
IRA A. CAMPBELL, Esq., Proctors for
Libelant.

DENMAN & ARNOLD, Proctors for Claimant.

No. 15,675.

LEGGETT STEAMSHIP COMPANY, a Corp.,
Libelant,

vs.

SAN FRANCISCO & PORTLAND S. S. CO., a
Corporation,

Respondent.

Opinion Dismissing Libel, etc.

DENMAN & ARNOLD, Proctors for Libelant.

McCUTCHEN, OLNEY & WILLARD and
IRA A. CAMPBELL, Esq., Proctors for
Respondent.

These are cross-actions growing out of a collision between the "Beaver" and the "Necanicum" which occurred October 30th, 1913. The "Beaver" is a passenger steamer of 2,997 net tonnage, and having a length of 380 feet and 57 feet beam. The "Necanicum" is a steam schooner, 175 feet in length and with a beam of 35 or 40 feet. The "Beaver," loaded, was coming down, and the "Necanicum," light, going up the coast, on approximately parallel courses. The former was proceeding at the rate of 14.7 knots, and the latter at the rate of $8\frac{1}{4}$ knots per hour. The atmosphere was foggy, the fog occasionally rising and settling, and being denser at some times than at others. According to [660] the testimony of those on the "Necanicum," the "Beaver" was first sighted when about five miles distant, at which time she was a point or two on the starboard bow. The fog then settled and hid her from view until about two minutes before the collision. She was then, still on the starboard bow, distant about a half a mile. The "Necanicum" blew two whistles, denoting the intention to pass starboard to starboard. Instead of doing this the "Beaver" turned across the "Necanicum's" bow and the collision resulted. According to those on the "Beaver," the "Necanicum" was

sighted when about a mile distant, dead ahead, or a little on the port bow. The "Beaver" then gave a signal of one whistle which was not answered, and in about thirty seconds gave another similar signal, which was answered by one whistle from the "Necanicum," consummating an agreement that the vessels should pass port to port, but the "Necanicum," instead of turning to starboard, turned to port, thus bringing them together. Both claim to have been regularly blowing fog-signals, but each denies that the fog-signals of the other were heard. There is in this case, as in all similar cases coming under my observation, much contradictory testimony as to the events occurring at the time of the collision. But this one fact seems to me to stand out clearly; that the "Beaver" was gravely negligent in proceeding at the rate of 14.7 knots per hour in the fog, and that but for such speed, and the resulting momentum due to her size and weight, the collision would not have occurred. Contradictory as the testimony is, there is nothing therein which tends in any manner to excuse the running of a large, heavy and loaded passenger steamer at such a rate of speed in the fog then prevailing. This speed prevented the rectification, before it was too late, [661] of whatever error arose from confused or contradictory signals.

A decree will therefore be entered fixing the responsibility for the collision upon the "Beaver," and dismissing the libel of her owners. The other cause will be referred to the commissioner to ascertain and

report the damage which the "Necanicum" sustained.

December 10th, 1915.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Dec. 10, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [662]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

IN ADMIRALTY—No. 15,513.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY, a Corporation, Owner of the
American S. S. "BEAVER,"

Libellant,

vs.

The Steam Schooner "NECANICUM," Her En-
gines, Boilers, Boats, Tackle, Apparel and
Furniture,

Respondent.

LEGGETT STEAMSHIP COMPANY, a Corpora-
tion,

Claimant.

Decree Dismissing Libel.

This cause having been heard on the pleadings and proofs, and having been argued and submitted by the advocates of the respective parties, and due deliberation having been had, the Court now finds:

That the evidence fails to establish that the said steamship "Necanicum," prior to and at the time of the collision alleged in the libel, did not have a proper and efficient lookout and proper and competent officers, or that she failed to alter her course or conduct herself in accordance with the passing rules or exchange of signals between her and the steamship "Beaver," or that she failed to stop and reverse at a proper time before said collision; and further finds

That the said collision was not in any way caused or contributed to by any neglect, error, default or misconduct of the steamship "Necanicum," or her claimant, the Leggett Steamship Company; and further finds

That the said collision was caused by the neglect and [663] misconduct of the steamship "Beaver," in proceeding in the fog, prior to the collision, at an immoderate rate of speed, while the steamship "Necanicum" was proceeding at a moderate rate of speed for the conditions then prevailing;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that libelant take nothing by its libel herein, and that the said libel be dismissed, and the libelant is liable to the claimant, Leggett Steamship Company, for its costs to be taxed.

Dated December 13, 1915.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Dec. 13, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Entered in Vol. 6 Judg. and Decrees, at page 422.

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

IN ADMIRALTY—No. 15,513.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY, a Corporation, Owner of the
American S. S. "BEAVER,"

Libelant,

vs.

The Steam Schooner "NECANICUM," Her En-
gines, Boilers, Boats, Tackle, Apparel and
Furniture,

Respondent.

LEGGETT STEAMSHIP COMPANY, a Corpora-
tion,

Claimant.

Notice of Appeal.

To the Clerk of the above-entitled Court, and to the
Claimant and Respondent, and to Messrs Den-
man & Arnold, Its Proctors:

YOU AND EACH OF YOU WILL HEREBY
PLEASE TAKE NOTICE that the San Francisco
& Portland Steamship Company, a corporation,
owner of the American S. S. "Beaver," libelant
herein, hereby appeals from the final decree made and
entered herein in this cause on the 13th day of
December, 1915, to the next United States Circuit
Court of Appeals for the Ninth Circuit to be holden

in and for said circuit at the City and County of San Francisco, State of California.

Dated June 12th, 1916.

IRA A. CAMPBELL and

McCUTCHEN, OLNEY, WILLARD,

Proctors for Libelant. [665]

Service of the within Notice and receipt of a copy is hereby admitted this 12th day of June, 1916.

WILLIAM DENMAN,

DENMAN & ARNOLD,

Proctors for Claimant.

[Endorsed]: Filed Jun. 12, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [666]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,513.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY, a Corporation, Owner of the American S. S. "BEAVER,"

Libelant,

vs.

The Steam Schooner "NECANICUM," Her Engines, Boilers, Boats, Tackle, Apparel and Furniture,

Respondent,

LEGGETT STEAMSHIP COMPANY, a Corporation,

Claimant.

Assignment of Errors.

Comes now the San Francisco & Portland Steamship Company, a corporation, libelant and appellant herein, and contends that in the record, opinion, decision and final decree in said cause there is manifest a material error, and said appellant now makes, files and presents the following assignment of errors on which it relies, to wit:

I.

That the District Court erred in rendering the decree herein of date December 13, 1915, dismissing the libel herein.

II.

That the District Court erred in rendering the decree herein of date December 13, 1915, ordering, adjudging and decreeing that libelant take nothing by its libel herein. [667]

III.

That the District Court erred in rendering the decree herein of date December 13, 1915, ordering, adjudging and decreeing libelant liable to claimant for its costs thereafter taxed under date of June 9, 1916, in the sum of \$626.89.

IV.

That the District Court erred in holding and deciding that the evidence failed to establish that the steamship "Necanicum," prior to and at the time of the collision alleged in the libel did not have a proper and efficient lookout.

V.

That the District Court erred in not holding and deciding that the evidence establishes that the steam-

ship "Necanicum," prior to and at the time of the collision alleged in the libel, did not have a proper and efficient lookout.

VI.

That the District Court erred in holding and deciding that the evidence failed to establish that the steamship "Necanicum," prior to and at the time of the collision alleged in the libel, did not have proper and competent officers.

VII.

That the District Court erred in not holding and deciding that the evidence established that the steamship "Necanicum," prior to and at the time of the collision alleged in the libel, did not have proper and competent officers. [668]

VIII.

That the District Court erred in holding and deciding that the evidence failed to establish that the steamship "Necanicum" failed to alter her course or conduct herself in accordance with the passing rules or exchange of signals between her and the steamship "Beaver."

IX.

That the District Court erred in not holding and deciding that the evidence established that the steamship "Necanicum" failed to alter her course or conduct herself in accordance with the passing rules or exchange of signals between her and the steamship "Beaver."

X.

That the District Court erred in holding and deciding that the evidence failed to establish that the

steamship "Necanicum" failed to stop and reverse at a proper time before said collision.

XI.

That the District Court erred in not holding and deciding that the evidence established that the steamship "Necanicum" failed to stop and reverse at a proper time before said collision.

XII.

That the District Court erred in holding and deciding that said collision was not in any way caused or contributed to by any negligence, error, default or misconduct of the steamship "Necanicum," and her claimant the Leggett Steamship Company.

XIII.

That the District Court erred in not holding and [669] deciding that said collision was caused or contributed to by the negligence, error, default or misconduct of the steamship "Necanicum," and her claimant the Leggett Steamship Company.

XIV.

That the District Court erred in holding and deciding that said collision was caused by the misconduct of said steamship "Beaver" in proceeding in the fog prior to the collision at an immoderate rate of speed.

XV.

That the District Court erred in not holding and deciding that said collision was not caused by any neglect or misconduct of the steamship "Beaver" by proceeding in the fog.

XVI.

That the District Court erred in holding and de-

ciding that said steamship "Beaver" was proceeding, prior to the collision, at an immoderate rate of speed under the conditions then prevailing.

XVII.

That the District Court erred in not holding and deciding that the steamship "Beaver" was proceeding at a moderate rate of speed under the conditions prevailing at and prior to the time of the collision.

XVIII.

That the District Court erred in not holding and deciding that the steamship "Necanicum" was proceeding at an immoderate rate of speed under the conditions of fog prevailing at and prior to the time of collision.

XIX.

That the District Court erred in holding and deciding that the steamship "Necanicum" was proceeding at [670] a moderate rate of speed for the conditions prevailing at and prior to the time of collision.

XX.

That the District Court erred in not holding and deciding that prior to said collision and before the exchange of any passing signals, the steamships "Beaver" and "Necanicum" were approaching on the port side of each other.

XXI.

That the District Court erred in not holding and deciding that the steamship "Beaver" gave a one-blast passing whistle and that the same was not answered by the steamship "Necanicum."

XXII.

That the District Court erred in not holding and deciding that said collision was caused and contributed to by the negligent and unskillful navigation of the steamship "Necanicum," in that while approaching the steamship "Beaver," port to port, said "Necanicum" answered a one-blast passing whistle with a similar signal, and, contrary to said signal, altered her course to port.

XXIII.

That the District Court erred in not holding and deciding that said collision was caused and contributed to by the negligent and unskillful navigation of the steamship "Necanicum" while approaching the steamship "Beaver," port to port, in altering her course to port towards said "Beaver" instead of to starboard away from her. [671]

XXIV.

That the District Court erred in not holding and deciding that the steamship "Beaver," while approaching the steamship "Necanicum" port to port, was carefully and skillfully navigated in that she gave said "Necanicum" a port passing signal, and thereupon altered her course to starboard, and, thereafter, upon seeing that said "Necanicum" was in disobedience of said signals, altering her course to port, reversed full speed astern and blew three blasts of her whistle, indicating that her engines were working full speed astern.

XXV.

That the District Court erred in not holding and deciding that said collision was caused and contrib-

uted to by the failure of said steamship "Necanicum" to reverse under a port helm in time to avoid said collision, and in not giving three blasts of her whistle to indicate such working of her engines.

In order that the foregoing assignment of errors may be and appear of record, said appellant files and presents the same and prays that such disposition be made thereof as is in accordance with the law and the statutes of the United States in such cases made and provided, and said appellant prays a reversal of the decree herein heretofore made and entered herein in the above-entitled cause and appealed from.

Dated: San Francisco, June 12, 1916.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Libelant.

[Endorsed]: Jun. 12, 1916. W. B. Maling, Clerk.
By C. W. Calbreath, Deputy Clerk. [672]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,513.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY, a Corporation, Owner of the
American S. S. "BEAVER,"

Libelant,

vs.

The Steam Schooner "NECANICUM," Her En-
gines, Boilers, Boats, Tackle, Apparel and
Furniture,

Respondent.

LEGGETT STEAMSHIP COMPANY, a Corpora-
tion,

Claimant.

**Stipulation and Order With Reference to Original
Exhibits.**

IT IS HEREBY STIPULATED AND AGREED
by and between the parties hereto that all of the ex-
hibits introduced in the depositions taken before the
Commissioner in the above-entitled case, and the ex-
hibits introduced at the hearing before the above-en-
titled court, may be sent up to the United States Cir-
cuit Court of Appeals for the Ninth Circuit as origi-
nal exhibits for the apostles on appeal and need not

be printed in said court of appeals.

IRA A. CAMPBELL,

McCUTCHEON, OLNEY & WILLARD,

Proctors for Libelant.

DENMAN & ARNOLD,

Proctors for Respondent.

It is so ordered by the Court.

Dated: April 3, 1917.

M. T. DOOLING,

Judge.

[Endorsed]: Filed Apr. 3, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [673]

**Certificate of Clerk U. S. District Court to Apostles
on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 673 pages, numbered from 1 to 673, inclusive, contain a full, true, and correct Transcript of certain records and proceedings in the case of San Francisco & Portland Steamship Company, a Corp., vs. the Steam Schooner "Necanicum," her tackle, etc., No. 15,513, as the same now remain on file and of record in this office; said Transcript having been prepared pursuant to and in accordance with "Praeipice for Apostles on Appeal" (copy of which is embodied in this transcript), and the instructions of the attorneys for libelant and appellant herein.

I further certify that the cost for preparing and certifying the foregoing Apostles on Appeal is the sum of Three Hundred Nine Dollars and Seventy

Cents (\$309.70), and that the same has been paid to me by the attorneys for the appellants herein.

(All exhibits are transmitted in their original form, with certificate attached.)

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 6th day of April, A. D. 1917.

[Seal]

WALTER B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk. [674]

[Endorsed]: No. 2969. United States Circuit Court of Appeals for the Ninth Circuit. San Francisco & Portland Steamship Company, a Corporation, Owner of the American Steamship "Beaver," Appellant, vs. Leggett Steamship Company, a Corporation, Claimant of the Steam Schooner "Necanicum," Her Engines, Boilers, Boats, Tackle, Apparel and Furniture, Appellee. Apostles on Appeal. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed April 6, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY, a Corporation, Owner of the
American S. S. "BEAVER,"

Appellee,

vs.

The Steam Schooner "NECANICUM," Her En-
gines, Boilers, Boats, Tackle, Apparel and
Furniture,

Respondent.

LEGGETT STEAMSHIP COMPANY, a Corpora-
tion,

Appellant.

**Stipulation and Order Extending Time to and
Including August 30, 1916, to File Record and
Docket Cause.**

IT IS HEREBY STIPULATED AND AGREED
by and between the respective parties hereto that the
time for printing the record and filing and docketing
this cause on appeal in the United States Circuit
Court of Appeals for the Ninth Circuit may be, and
the same is hereby, extended to and including the
30th day of August, 1916.

Dated: July 10, 1916.

WILLIAM DENMAN,
DENMAN & ARNOLD,
Proctors for Appellee.

IRA A. CAMPBELL,
McCUTCHEON, OLNEY & WILLARD,
Proctors for Appellant.

It is so ordered.

Dated July 10, 1916.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: In the United States Circuit Court of Appeals, for the Ninth Circuit. San Francisco & Portland Steamship Company, a Corporation, Owner of the American S. S. "Beaver," Appellee, vs. The Steam Schooner "Necanicum," etc., Respondent. Leggett Steamship Company, Appellant. Stipulation and Order Extending Time for Docketing Cause on Appeal. Filed Jul. 10, 1916. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY, a Corporation, Owner of the
American S. S. "BEAVER,"

Appellee,

vs.

The Steam Schooner "NECANICUM," Her En-
gines, Boilers, Boats, Tackle, Apparel and
Furniture,

Respondent.

LEGGETT STEAMSHIP COMPANY, a Corpora-
tion,

Appellant.

Stipulation and Order Extending Time to and Including October 30, 1916, to File Record and Docket Cause.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the time for printing the record and filing and docketing this cause on appeal in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to and including the 30th day of October, 1916.

Dated: August 22, 1916.

WILLIAM DENMAN,
DENMAN & ARNOLD,
Proctors for Appellee.

IRA A. CAMPBELL,
McCUTCHEON, OLNEY & WILLARD,
Proctors for Appellant.

It is so ordered.

Dated August 26, 1916.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: United States Circuit Court of Appeals, for the Ninth Circuit. San Francisco & Portland Steamship Company, a Corporation, etc., Appellee, vs. The Steam Schooner "Necanicum," etc., Respondent. Leggett Steamship Company, a Corporation, Appellant. Stipulation and Order Extending Time for Docketing Cause on Appeal. Filed Aug. 26, 1916. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY, a Corporation, Owner of the
American S. S. "BEAVER,"

Appellee,

vs.

The Steam Schooner "NECANICUM," Her En-
gines, Boilers, Boats, Tackle, Apparel and
Furniture,

Respondent.

LEGGETT STEAMSHIP COMPANY, a Corpora-
tion,

Appellant.

**Stipulation and Order Extending Time to and
Including December 30, 1916, to File Record and
Docket Cause.**

IT IS HEREBY STIPULATED AND AGREED
by and between the respective parties hereto that the
time for printing the record and filing and docketing
this cause on appeal in the United States Circuit
Court of Appeals for the Ninth Circuit be, and the
same is hereby, extended to and including the 30th
day of December, 1916.

Dated October 23d, 1916.

WILLIAM DENMAN,
DENMAN & ARNOLD,
Proctors for Appellee.

IRA A. CAMPBELL,
McCUTCHEON, OLNEY & WILLARD,
Proctors for Appellant.

It is so ordered.

Dated: October 23, 1916.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: In the U. S. Circuit Court of Appeals for the Ninth Circuit. San Francisco & Portland Steamship Company, etc., Appellee, vs. The Steam Schooner "Necanicum," Her Engines, Boilers, Boats, Tackle, Apparel and Furniture, Respondent, Leggett Steamship Company, a Corporation, Appellant. Stipulation and Order Extending Time for Docketing Cause on Appeal. Filed Oct. 23, 1916. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

No. —.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY, a Corporation, Owner of the
American S. S. "BEAVER,"

Appellee,

vs.

The American Schooner "NECANICUM," Her En-
gines, Boilers, Boats, Tackle, Apparel and
Furniture,

Respondent.

LEGGETT STEAMSHIP COMPANY, a Corpora-
tion,

Appellant.

**Stipulation and Order Extending Time to and
Including February 28, 1917, to File Record and
Docket Cause.**

IT IS HEREBY STIPULATED AND AGREED
by and between the respective parties hereto that the
time for printing the record and filing and docketing
this cause on appeal in the United States Circuit
Court of Appeals for the Ninth Circuit be, and the
same is hereby, extended to and including the 28th
day of February, 1917.

Dated December 26, 1916.

WILLIAM DENMAN,
DENMAN & ARNOLD,
Proctors for Appellee.

IRA A. CAMPBELL,
McCUTCHEON, OLNEY & WILLARD,
Proctors for Appellant.

It is so ordered.

Dated December 28, 1916.

WM. H. HUNT,
Circuit Judge.

[Endorsed]: In the U. S. Circuit Court of Appeals for the Ninth Circuit. San Francisco & Portland Steamship Company, etc., Appellee, vs. The American Schooner "Necanicum," etc., Respondent, Leggett Steamship Company, a Corporation, Appellant. Stipulation Extending Time for Printing Record and for Docketing Cause on Appeal. Filed Dec. 29, 1916. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

No. —.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY, a Corporation, Owner of the
American S. S. "BEAVER,"

Appellee,

vs.

The American Schooner "NECANICUM," Her En-
gines, Boilers, Boats, Tackle, Apparel and
Furniture,

Respondent.

LEGGETT STEAMSHIP COMPANY, a Corpora-
tion,

Appellant.

**Stipulation and Order Extending Time to and
Including March 28, 1917, to File Record and
Docket Cause.**

IT IS HEREBY STIPULATED AND AGREED
by and between the respective parties hereto that the
time for printing the record and filing and docketing
this cause on appeal in the United States Circuit
Court of Appeals for the Ninth Circuit be, and the
same is hereby, extended to and including the 28th
day of March, 1917.

Dated February 28, 1917.

DENMAN and ARNOLD,
THOMAS A. THACHER,

Proctors for Appellee.

IRA A. CAMPBELL,

McCUTCHEON, OLNEY & WILLARD,

Proctors for Appellant.

It is so ordered.

Dated: February 28, 1917.

WM. W. MORROW,

Circuit Judge.

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. San Francisco & Portland Steamship Company, a Corporation, Owner of the American S. S. "Beaver," Appellee, vs. The American Schooner "Necanicum," etc., Respondent. Leggett Steamship Company, a Corporation, Appellant. Stipulation. Filed Feb. 28, 1917. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. —.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY, a Corporation, Owner of the
American S. S. "BEAVER,"

Appellee,

vs.

The Steam Schooner "NECANICUM," Her En-
gines, Boilers, Boats, Tackle, Apparel and
Furniture,

Respondent.

LEGGETT STEAMSHIP COMPANY, a Corpora-
tion,

Appellant.

**Stipulation and Order Extending Time to and
Including April 6, 1917, to File Record and
Docket Cause.**

IT IS HEREBY STIPULATED AND AGREED
by and between the respective parties hereto that the
time for printing and filing and docketing this cause
on appeal in the United States Circuit Court of Ap-
peals for the Ninth Circuit be, and the same is here-
by, extended to and including the 6th day of April,
1917.

Dated: March 28, 1917.

W. S. BURNETT,
DENMAN & ARNOLD,
Proctors for Appellee.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Appellant.

It is so ordered.

Dated: March 28, 1917.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. San Francisco & Portland Steamship Company, etc., Appellee, vs. The American Schooner "Necanicum," etc., Respondent. Leggett Steamship Company, etc., Appellant. Stipulation and Order Under Rule 16 Enlarging Time to and Including Apr. 6, 1917, to File Record Thereof and to Docket Case. Filed Mar. 28, 1917. F. D. Monckton, Clerk.

No. 2969. United States Circuit Court of Appeals for the Ninth Circuit. S. F. & Portland S. S. Co., etc., vs. Leggett Steamship Co., etc. Six Stipulations and Orders Under Rule 16 Enlarging Time to Apr. 6, 1917, to File Record Thereof and to Docket Case. Refiled Apr. 6, 1917. F. D. Monckton, Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY, a Corporation,

Appellant,

vs.

LEGGETT STEAMSHIP COMPANY, a Corpora-
tion,

Appellee,

Apostles on Appeal.

Upon Appeal from the Southern Division of the United States
District Court for the Northern District of California,
First Division.

Filed

APR 20 1917

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY, a Corporation,
Appellant,
vs.

LEGGETT STEAMSHIP COMPANY, a Corpora-
tion,
Appellee,

Apostles on Appeal.

Upon Appeal from the Southern Division of the United States
District Court for the Northern District of California,
First Division.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,675.

LEGGETT STEAMSHIP COMPANY, a Corporation,
tition,

Libellant,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY, a Corporation,

Respondent.

Praeceptum for Apostles on Appeal.

To the Clerk of the Above-entitled Court:

Please prepare transcript of record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit upon the appeal heretofore perfected in this court, and include in said transcript the following pleadings, proceedings and papers on file, to wit:

(1) All those papers required by Section 1 of Paragraph 1 of Rule 4 of the Rules of Admiralty of the United States Circuit Court of Appeals for the Ninth Circuit;

(2) All the pleadings in said cause and all of the exhibits annexed thereto;

(3) The stipulation waiving reference and agreeing upon the amount of damages;

(4) The stipulation concerning the hearing of said cause by the United States Circuit Court of Appeals upon the testimony taken [1*] in case No.

*Page-number appearing at foot of page of original certified Transcript of Record.

2 *San Francisco & Portland S. S. Company*

15,513 of the records of the above-entitled court;

(5) The opinion and decision of the Court entered in the consolidated cases;

(6) The final decree and notice of appeal;

(7) The assignments of error.

IRA A. CAMPBELL,

McCUTCHEEN, OLNEY & WILLARD,

Proctors for Respondent and Appellant.

Service of the within Praecipe for Apostles on Appeal and receipt of a copy is hereby admitted this 17th day of March, 1917.

W. S. BURNETT,

DENMAN & ARNOLD,

Proctors for Libellant.

[Endorsed]: Filed Mar. 17, 1917. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [2]

Statement of Clerk U. S. District Court.

*In the Southern Division of the District Court of the
United States, Northern District of California,
First Division.*

TITLE OF CAUSE.

No. 15,675.

LEGGETT STEAMSHIP COMPANY, a Corporation,
tion,

Libellant,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY, a Corporation,

Respondent. [3]

PARTIES.

Libelant: Leggett Steamship Company, a corporation.

Respondent: San Francisco & Portland Steamship Company, a corp.

PROCTORS.

for

Libelant: William Denman, Esq., and Denman & Arnold.

Respondent: Ira A. Campbell, Esq., and McCutchen, Olney & Willard.

PROCEEDINGS.

1914.

- July 21. Filed verified libel for damages, caused by collision, (\$2707.99).
22. Issued Citation for the appearance of the Respondent, San Francisco & Portland Steamship Company, a corp., which Citation was afterwards, on July 24th, 1914, returned and filed, with the following return of the U. S. Marshal endorsed thereon;

“I hereby certify and return that I served the annexed writ on the therein-named S. F. and Portland S. S. Co. at San Francisco, Calif., by handing [4] to and leaving a true and correct copy thereof with H. W. Deans, Assist. General Manager S. F. and Portland S. S. Co. personally, at San

San Francisco, Calif., in said District
on the 23d day of July, 1914.

J. B. HOLOHAN,
U. S. Marshal,
By C. B. Delancey,
Office Deputy."

September 22. Filed Answer of Respondent.

October 15. The Court, this day, made an order
that this cause be consolidated, for
trial, with the cause entitled San
Francisco & Portland Steamship
Co., a Corp., vs. Steam Schr. "Nec-
canicum," etc., No. 15,513.

The causes, as consolidated, this
day, came on for hearing, in the
District Court of the United
States, for the Northern District
of California, at San Francisco,
before the Honorable M. T.
DOOLING, Judge, and after
hearing duly had, the causes were
continued until October 16th, for
further hearing. Further hear-
ings were had on October 16th,
20th, 21st, and 22d, respectively,
on which last-mentioned day the
matters were ordered submitted,
in briefs to be filed.

20. Filed (in case No. 15,513), deposi-
tion of Theodore J. Hewitt, taken
on behalf of S. F. & Portland S. S.
Co., before John P. Hannon, a No-
tary Public, at Portland, Oregon.
[5]

October 21. Filed (in case No. 15,513), deposition of Alfred F. Pillsbury, taken on behalf of S. F. and Portland S. S. Co., before Francis Krull, U. S. Commissioner.

1915.

August 19. The causes, as heretofore consolidated, this day, came on for argument, and after argument duly had, the Court ordered the matters submitted.

December 10. The Court this day filed an opinion, in which it was ordered that the Libel in the cause, entitled, S. F. & Portland S. S. Co. vs. Steam Schooner "Necanicum," etc., No. 15,513, be dismissed; holding the "Beaver" (owned by the S. F. & Portland S. S. Co.) responsible for Collision, and referring this cause (No. 15,675) to U. S. Commissioner to ascertain and report damage sustained by the "Necanicum."

21. Filed Interlocutory Decree.

1916.

December 28. Filed Stipulation as to damages (\$2372.81, exclusive of interest and costs).

1917.

January 4. Filed Final Decree.

February 6. Filed Notice of Appeal.

7. Filed Bond on Appeal in the aggre-

I.

That libelant is a corporation organized and existing under the laws of the State of New Jersey, that at all times herein mentioned it was, and now is, the owner of the steam schooner "Necanicum."

II.

That respondent is a corporation duly organized and existing under and by virtue of the laws of the State of Utah, and is and was during all times herein mentioned the owner of the steamship "Beaver," an American vessel of 4507 tons gross register, whereof E. Mason late was and now is master.

III.

That heretofore, and on or about the 30th day of October, 1913, and just before the hour of two o'clock P. M., said steam schooner "Necanicum" was proceeding up along the coast of California, [7] between Point Reyes and Point Arena, and then and there sighted the steamer "Beaver," bearing on the "Necanicum's" starboard bow and distant several miles, coming down the coast on a course apparently parallel to that of the "Necanicum"; that shortly thereafter a fog settled down, entirely obscuring the steamship "Beaver" from the view of those on the steam schooner "Necanicum"; that the said "Necanicum" proceeded on her course at a moderate speed, and at all times herein mentioned had a proper lookout and competent officers on watch, and did at all times maintain such a lookout and a careful watch to determine the approach of other vessels, if any, in said fog; that thereafter, and at about the hour of two fifteen o'clock P. M., and while proceeding at a moderate rate of speed, the lookout and the

officers in charge of the "Necanicum" sighted the steamer "Beaver" proceeding through the fog at a very high rate of speed, to wit, fifteen knots or thereabouts, on a course apparently parallel to that of the "Necanicum," and bearing from the "Necanicum" well on her starboard bow, that the officer in charge of the "Necanicum" thereupon proceeded to starboard her helm and sounded two blasts of the steam whistle, thus announcing his intention of passing the "Beaver" on his starboard side; that thereupon the said "Beaver," still proceeding at a high rate of speed, instead of starboarding her helm to conform to said manoeuver, did port her helm and proceed on a course across the bows of the "Necanicum"; that thereupon the officer in charge of the "Necanicum" did at once put her helm hard aport and reverse her propeller at full speed and sound three blasts of her whistle, indicating that her engines were going astern full speed; that the speed of the "Necanicum" rapidly diminished until she stopped in the water and began to move astern, but the steamer "Beaver" continued to approach rapidly and struck the "Necanicum's" stem with her port side, twisting the "Necanicum's" bow and stem to port, smashing in her anchor on her port side, and inflicting [8] various grievous injuries upon her, that the said steamer "Beaver" continued on without stopping and shortly thereafter disappeared in the fog, at no time returning to the steam schooner "Necanicum" but deserting her in her injured condition; that thereafter the said schooner "Necanicum" did give up her said voyage and did put about and return to a port of refuge, to wit, the port of San Francisco.

IV.

That the hull of the said steam schooner "Necanicum" was damaged to the amount of Eighteen Hundred and Seven and 99/100 Dollars (\$1807.99), and that the time occupied in making the said port of refuge and in repairing the said injuries to the said vessel was nine (9) days, and that the reasonable value of said demurrage or delay of said vessel during said period and her costs of steaming to said port, is Nine Hundred Dollars (\$900), no part of which has been paid.

V.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, libelant prays that a monition in due form of law, according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction, may issue against said San Francisco & Portland Steamship Company, and that it be cited to appear and answer upon oath all and singular the matters aforesaid, and that this Honorable Court decree payment of the damages aforesaid, with interest and costs, and that libelant may have such other and further relief as in law and justice it may be entitled to receive.

WILLIAM DENMAN,
DENMAN & ARNOLD,
Proctors for Libelant.

W. S. BURNETT,
Advocate. [9]

Answer.

To the Honorable M. T. DOOLING, Judge of the
United States District Court for the Northern
District of California:

The answer of San Francisco & Portland Steamship Company, a corporation, respondent herein, to the libel of the Leggett Steamship Company, a corporation, libellant herein, admits, denies and alleges, as follows:

I.

Respondent admits the allegations of Article I of said libel.

II.

Respondent admits the allegations of Article II of said libel. [11]

III.

Answering unto the allegations of Article III of said libel, respondent admits that heretofore, on or about the 30th day of October, 1913, and just before the hour of two o'clock P. M., said steam schooner "Necanicum" was proceeding up along the coast of California, between Point Reyes and Point Arena, but respondent is without knowledge as to whether or not said "Necanicum" then and there sighted the steamer "Beaver," and for that reason denies the same, and demands that strict proof of said allegation be made.

Respondent denies, however, that then and there, or at any other time, said "Necanicum" sighted the steamer "Beaver" bearing on the "Necanicum's" starboard bow several miles distant. It admits,

however, that said "Necanicum" may have sighted said "Beaver" several miles distant, and coming down the coast on a course apparently parallel to that of the "Necanicum." Respondent is without knowledge as to whether or not shortly after said "Necanicum" sighted said "Beaver" a fog settled down, entirely obscuring the steamer "Beaver" from the view of those on the "Necanicum," and for that reason denies the same, and demands that strict proof of same be made. Respondent denies that said "Necanicum" proceeded on her course at a moderate speed, and denies that at all times mentioned in said libel she had a proper lookout and competent officers on watch, and denies that she did, at all times, maintain such a lookout and a careful watch to determine the approach of other vessels, if any, in said alleged fog; denies that thereafter and at [12] about the hour of 2:15 o'clock P. M., or at any other time, and while proceeding at a moderate rate of speed, or under any other conditions, the lookout and the officer in charge of the "Necanicum," or any other persons whomsoever, sighted the steamer "Beaver" proceeding through the fog at a very high rate of speed, to wit, 15 knots, or thereabouts, on a course apparently parallel to that of the "Necanicum," and bearing from the "Necanicum" well on her starboard bow. Respondent denies that the officer in charge of the "Necanicum" thereupon proceeded to starboard her helm and sounded two blasts of the steam whistle, thus announcing his intention of passing the "Beaver" on the starboard side. Respondent denies that thereupon the said "Beaver," still pro-

ceeding at a high rate of speed, instead of starboard-
ing her helm to conform to said manœuvre, did port
her helm and proceeded on a course across the bows
of said "Necanicum." Respondent further denies
that thereupon the officer in charge of said "Necani-
cum" did at once put her helm hard a port and re-
verse her propeller at full speed and sound three
blasts of her whistle, indicating that her engines
were going astern full speed; further denies that the
speed of the "Necanicum" rapidly diminished until
she stopped in the water and began to move astern;
further denies that the steamer "Beaver" continued
to approach rapidly and struck the "Necanicum's"
stem with her port side, twisting the "Necanicum's"
bow and stem to port, smashing in her anchor on
her port side, and inflicting various grievous injuries
upon her; denies that said steamer "Beaver" con-
tinued on without stopping, and shortly thereafter
disappeared in the fog; denies that she, at no time,
returned [13] to the steam schooner "Necani-
cum," or that she deserted her in her injured condi-
tion. Respondent admits that, thereafter, said
steam schooner "Necanicum" did give up her said
voyage, and did put about and return to the port of
San Francisco.

IV.

Answering unto the allegations of Article IV of
said libel, respondent avers that it is without knowl-
edge as to the truth or falsity of the same, and for
that reason demands strict proof thereof, if the
same be material.

V.

Answering unto the allegations of Article V of said libel, respondent denies that all and singular the premises are true, but admits that they are within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Further answering unto said libel, respondent avers that said collision between said steam schooner "Necanicum" and said steamship "Beaver" occurred under the following circumstances and conditions, and not otherwise.

I.

That heretofore, on the 30th day of October, 1913, at about the hour of 2:18 P. M., said steamship "Beaver" was run into and seriously damaged by said steam schooner "Necanicum"; that prior to and at the time of said collision, said steamship "Beaver" was proceeding southward along the coast of California, between Point Arena and Point Reyes, on a course approximately south 50° east, and on or about the [14] hour of 2:14 P. M. the officers of said "Beaver" sighted said "Necanicum" ahead, from a mile to a mile and a half distant, bearing slightly on the "Beaver's" port bow, and proceeding northward on a course approximately parallel with that of said "Beaver"; that upon sighting said steam schooner "Necanicum," the master of said steamship "Beaver" blew a one blast passing whistle and altered her course to port; that no answer to said signal was received from said "Necanicum," and thereafter, approximately half a minute later, the master of said "Beaver" blew a second one blast passing

whistle, which whistle was answered by said "Necanicum" with a like signal, thereby consummating an agreement that said vessels were to pass on the port side of each other; that immediately after said passing signals had been exchanged, however, said "Necanicum" was observed by the officers of said "Beaver" not to be altering her course to starboard, as required by said signals, but swinging to port toward the course of said "Beaver"; that thereupon the engine of said "Beaver" was reversed full speed astern and here helm put hard aport, and, simultaneously therewith, the master of said "Beaver" gave three blasts of her whistle, indicating to said "Necanicum" that the engine of said "Beaver" was working full speed astern; that, in the meantime, without responding to said three blasts, said "Necanicum" continued to swing to port toward said "Beaver," and notwithstanding the reversing of said "Beaver's" engine and the hard a'porting of her helm, she was unable to avoid said collision, and said "Necanicum" struck said "Beaver" on the latter's port bow, at nearly right angles, approximately twelve feet abaft [15] her stem; that immediately thereafter said "Necanicum" backed away, and shortly became lost in the fog which afterward set in.

That from prior to said "Beaver" passing Point Arena the day was fair, and a light drifting fog at various short intervals prevailed, during all of which time the officers and lookout of said "Beaver" could see a distance of from not less than two to ten miles, and, during all of which times, as conditions re-

quired, the automatic fog signal of said "Beaver" was regularly blown, and a moderate speed maintained, as required by law.

II.

That at all of said times proper and competent officers were on watch and a proper and efficient lookout was maintained on said "Beaver"; that said collision was not caused by any fault or neglect in the navigation of said "Beaver," as required by the International Rules of Navigation, but was solely caused by the careless and negligent navigation of said "Necanicum" in that she did not have on watch proper and competent officers, and did not maintain a proper and efficient lookout, and did not alter her course to starboard so as to pass said "Beaver" to port, as required by said passing signals, and did not stop and reverse on receiving said signals from said "Beaver," and did not alter her course to starboard when danger of collision became imminent.

III.

That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United [16] States and of this Honorable Court.

WHEREFORE, respondent prays that the libel herein may be dismissed, and that it may have judgment for its costs and disbursements herein incurred, and for such other relief as it may be entitled to in law and in equity.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,

Proctors for Respondent. [17]

State of California,

City and County of San Francisco,—ss.

G. L. Blair, being first duly sworn, deposes and says: That he is an officer, to wit, general manager of San Francisco & Portland Steamship Company, above-named respondent; that he makes this verification for and on behalf of said respondent as such officer; that he has read the foregoing answer, knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or relief, and as to those matters that he believes it to be true.

G. L. BLAIR.

Subscribed and sworn to before me this 21st day of September, 1914.

[Seal]

FRANK L. OWEN,

Notary Public in and for the City and County of San Francisco, State of California.

Service of the within Answer and receipt of a copy is hereby admitted this 21st day of September, 1914.

W. S. BURNETT,

WILLIAM DENMAN,

DENMAN and ARNOLD,

Proctors for Libelant.

[Endorsed]: Filed Sep. 22, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [18]

*In the District Court of the United States, in and
for the Northern District of California.*

No. 15,675.

LEGGETT STEAMSHIP COMPANY, a Corpora-
tion,

Libelant,

vs.

SAN FRANCISCO AND PORTLAND STEAM-
SHIP COMPANY, a Corporation,

Respondent.

Interlocutory Decree for Libelant.

This cause having been heard on the merits on the proceedings and proofs, and having been argued and submitted by the advocates of the respective parties, and due liberation having been had, the Court now finds:

That the collision in the libel described was caused by the misconduct of the steamship "Beaver" in proceeding in the fog prior to and up to the time of the collision at an immoderate rate of speed, while the steamship "Necanicum" was proceeding at a moderate rate of speed for the conditions then prevailing;

That the evidence fails to establish that libelant or the said steamship "Necanicum," prior to and at the time of the collision alleged in the libel, did not have a proper and efficient lookout and proper and competent officers, or that she failed to alter her course or conduct herself in accordance with the pass-

ing rules or exchange of signals between her and the steamship "Beaver," on that she failed to stop and reserve at a proper time before said collision; and further finds

That the said libelant or the said steamship "Necanicum" was not guilty of any neglect, error, default or misconduct at the time of or prior to the said collision, and that the said collision was not in any way caused or contributed to by any act on the part of libelant or the said steamship "Necanicum." [19]

WHEREFORE it is ordered, adjudged and decreed that the libelant have a decree against the respondent, the San Francisco and Portland Steamship Company, for the injury arising to libelant from the said collision, with interest and costs, and that the matter be referred to Francis Krull, United States Commissioner, to hear and determine the amount of the said damages, and to report the same to this Court.

Dated December 21st, 1915.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Dec. 21st, 1915. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.

Entered in Vol. 6 Judg. and Decrees, at page 429.
[20]

*In the District Court of the United States, in and for
the Northern District of California, First Di-
vision.*

IN ADMIRALTY—No. 15,675.

LEGGETT STEAMSHIP COMPANY, a Corpora-
tion,

Libelant,

vs.

SAN FRANCISCO AND PORTLAND STEAM-
SHIP COMPANY, a Corporation,

Respondent.

Stipulation as to Damages.

WHEREAS, it has heretofore been decreed by the above-entitled court that the libelant herein have a decree against the respondent herein for the injury set forth in the libel herein, with interest, and that the matter be referred to Francis Krull, United States Commissioner, to hear and determine the amount of said damages and report the same to said court; and

WHEREAS the parties hereto have agreed upon the amount of damages;

NOW, THEREFORE, it is hereby stipulated, by and between the parties hereto that the damages suffered by said libelant arising from said injury amount to the sum of Two Thousand Three Hundred and seventy-two and 81/100 Dollars (\$2,372.81), exclusive of interest and costs; and that said reference to said master is hereby waived; and that said sum of Two Thousand Three Hundred and Seventy-

two and 81/100 (\$2,372.81) be deemed reported to said court by said master, pursuant to said decree.

Dated December 26, 1916.

DENMAN & ARNOLD,

Proctors for Libelant.

McCUTCHEN, OLNEY & WILLARD,

Proctors for Respondent.

[Endorsed]: Filed Dec. 28, 1916. W. B. Maling
Clerk. By C. W. Calbreath, Deputy Clerk. [21]

*In the District Court of the United States, in and for
the Northern District of California, First Divi-
sion.*

IN ADMIRALTY—No. 15,675.

LEGGETT STEAMSHIP COMPANY, a Corpora-
tion,

Libelant,

vs.

SAN FRANCISCO AND PORTLAND STEAM-
SHIP COMPANY, a Corporation,

Respondent.

Final Decree for Libelant.

This cause having heretofore been duly heard on the merits and an interlocutory decree for libelant having been entered therein, wherein certain findings have been made, upon which this decree is based, and

WHEREAS in said interlocutory decree the matter of the amount of damages was referred to Francis Krull, United States Commissioner, and

WHEREAS thereafter the said Francis Krull did

proceed abroad and is now beyond the jurisdiction of this Court; and

WHEREAS the parties hereto have stipulated as follows:

“WHEREAS it has heretofore been decreed by the above-entitled court that the libelant herein have a decree against the respondent herein for the injury set forth in the libel herein, with interest, and that the matter be referred to Francis Krull, United States Commissioner, to hear and determine the amount of said damages and report the same to said court; and

“WHEREAS the parties hereto have agreed upon the amount of damages;

“NOW, THEREFORE, it is hereby stipulated, by and between [22] the parties hereto that the damages suffered by said libelant arising from said injury amount to the sum of Two Thousand Three Hundred and Seventy-two and 81/100 Dollars (\$2,372.81), exclusive of interest and costs, and that said reference to said master is hereby waived; and that said sum of Two Thousand Three Hundred and Seventy-two and 81/100 Dollars (\$2,372.81) be deemed reported to said court by said master, pursuant to said decree.

Dated December 26, 1916.

DENMAN & ARNOLD,

Proctors for Libelant.

McCUTCHEON, OLNEY & WILLARD,

Proctors for Respondent.”

And WHEREAS interest is due upon the said damages from the said disaster to this date;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the respondent, San Francisco & Portland Steamship Company, a corporation, is indebted to and shall pay to libelant the sum of Two Thousand Eight Hundred and Twenty-four and 83/100 Dollars (\$2,824.83), and interest from the date of this decree at six (6) per cent per annum, and its costs in the sum of to be hereafter taxed and entered herein.

Dated January 2, 1917.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jan. 4, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk.

Entered in Vol. 7, Judg. and Decrees, at page 93.
[23]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,675.

LEGGETT STEAMSHIP COMPANY, a Corpora-
tion,

Libelant,

VS.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY, a Corporation,

Respondent.

Notice of Appeal.

To the Clerk of the Above-entitled Court, and to
Libelant in Said Cause, and to Messrs. Denman
& Arnold, Its Proctors:

YOU AND EACH OF YOU will please hereby
take notice that San Francisco & Portland Steamship
Company, a corporation, respondent in the above-
entitled action, hereby appeals from the final decree
made and entered in this cause on the 4th day of
January, 1917, to the next United States Circuit
Court of Appeals for the Ninth Circuit, to be holden
in and for said circuit at the city and county of San
Francisco, State of California.

Dated San Francisco, February 6th, 1917.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Respondent. [24]

Service of the within Notice of Appeal and receipt
of a copy is hereby admitted this 6th day of Febru-
ary, 1917.

DENMAN & ARNOLD,

Proctors for Libelant.

[Endorsed]: Filed Feb. 6, 1917. W. B. Maling,
Clerk. By T. L. Baldwin, Deputy Clerk. [25]

tions prevailing at and prior to the time of the collision.

4. That the District Court erred in not holding and deciding that the steamship "Necanicum" had violated subdivision 1 of the article 16 of the International Rules of Navigation, in that she was proceeding at an immoderate rate of speed in the fog. [26]

5. That the District Court erred in not holding and deciding that prior to and at the time of the collision the steamship "Necanicum" did not have a proper and efficient lookout.

6. That the District Court erred in not holding and deciding that prior to and at the time of the collision the steamship "Necanicum" did not have proper and competent and efficient officers.

7. That the District Court erred in not holding and deciding that the steamship "Necanicum" failed to alter her course or conduct herself in accordance with the passing rules or exchange of signals between her and the steamship "Beaver."

8. That the District Court erred in not holding and deciding that the steamship "Necanicum" failed to stop and reverse at a proper time before the collision.

9. That the District Court erred in not holding and deciding that prior to said collision, and before the exchange of any passing signals, the steamships "Beaver" and "Necanicum" were approaching on the port side of each other.

10. That the District Court erred in not holding and deciding that the steamship "Beaver" gave a

one-blast passing whistle and that the said passing whistle was not answered by the steamship "Necanicum."

11. That the District Court erred in not holding and deciding that said collision was caused and contributed to by the negligence and unskillful navigation of the steamship "Necanicum," in that while approaching the steamship "Beaver" port to port said "Necanicum" answered a one-blast passing whistle, with a similar whistle and, contrary to said signal, altered her course to port.

12. That the District Court erred in not holding and deciding [27] that said collision was caused and contributed to by the negligent and unskillful navigation of the steamship "Necanicum" while approaching the steamship "Beaver" port to port, in altering her course to port towards the steamship "Beaver," instead of to starboard and away from her.

13. That the District Court erred in not holding and deciding that the steamship "Beaver" while approaching the steamship "Necanicum," port to port, was carefully and skillfully navigated, in that she gave said "Necanicum" a port passing whistle and thereupon altered her course to starboard, and, thereafter, upon seeing that said "Necanicum" was in disobedience of said signal, altering her course to port, reversed her engines full speed astern and blew three blasts of her whistle to indicate that her engines were working full speed astern.

14. That the District Court erred in not holding and deciding that said collision was caused and con-

tributed to by the failure of said steamship "Necanicum" to reverse under a port helm in time to avoid said collision and in not giving three blasts of her whistle to indicate such working of her engines.

15. That the District Court erred in holding and deciding that said collision was not in any way caused or contributed to by any negligence, error, default or misconduct of the steamship "Necanicum" and her claimant, the Leggett Steamship Company.

16. That the District Court erred in not holding and deciding that said collision was caused or contributed to by the negligence, error, default or misconduct of the steamship "Necanicum" and her claimant, the Leggett Steamship Company.

17. That the District Court erred in holding and deciding that the steamship "Beaver" was proceeding, prior to the collision, [28] at an immoderate rate of speed under the conditions then prevailing.

18. That the District Court erred in holding and deciding that said collision was caused by the misconduct of the said steamship "Beaver" in proceeding in the fog, prior to the collision, at an immoderate rate of speed.

19. That the District Court erred in not holding and deciding that the steamship "Beaver" was proceeding at a moderate rate of speed under the conditions prevailing at and prior to the time of the collision.

In order that the foregoing assignment of errors may be and appear of record, said appellant files and presents the same and prays that such disposition be made thereof as in accordance with the law and

the statutes of the United States in such cases made and provided; and said appellant prays a reversal of the decree herein, heretofor made and entered herein, in the above-entitled case and appealed from.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Respondent and Appellant.

Service of the within Assignment of Errors and receipt of a copy is hereby admitted this 30th day of March, 1917.

DENMAN & ARNOLD,

Proctors for Libelant.

[Endorsed]: Filed Mar. 30, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [29]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,675.

LEGGETT STEAMSHIP COMPANY, a Corporation,
tion,

Libelant,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY, a Corporation,

Respondent.

**Stipulation With Reference to Testimony, etc.,
Taken in Consolidated Causes.**

IT IS HEREBY STIPULATED AND AGREED
that all testimony and all other proof adduced, in-

cluding the testimony taken at the trial, all depositions taken and admitted in evidence, and all exhibits introduced in said cause, or in the cause entitled in said court, as San Francisco & Portland Steamship Company, a corporation, Owner of the American S. S. "Beaver," Libelant, vs. The Steam Schooner "Necanicum," Her Engines, Boilers, Boats, Tackle, Apparel and Furniture, Respondent, Leggett Steamship Company, a Corporation, Claimant, and bearing No. 15,513, may be considered for all purposes as having been heard and considered in this cause, including the purpose of hearing and decision of this cause on appeal, and that said cause may be consolidated in the United States Circuit Court of Appeals with the said cause of San Francisco & Portland Steamship Company, a Corporation, Owner of the American S. S. "Beaver," Libelant, [30] vs. The Steam Schooner "Necanicum," Her Engines, Boilers, Boats, Tackle, Apparel and Furniture, Respondent, Leggett Steamship Company, a corporation, Claimant, No. 15,513, and heard and considered by said appellate court upon the record filed and perfected in said last mentioned cause.

Dated March 17, 1917.

W. S. BURNETT,
DENMAN & ARNOLD,
Proctors for Libelant.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Respondent.

[Endorsed]: Filed Mar. 17, 1917. W. B. Maling
Clerk. By C. W. Calbreath, Deputy Clerk. [31]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,675.

LEGGETT STEAMSHIP COMPANY, a Corporation,
tion,

Libelant,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY, a Corporation,

Respondent.

Stipulation and Order with Reference to Original Exhibits.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto that all of the exhibits introduced in the depositions taken before the Commissioner in the above-entitled case, and the exhibits introduced at the hearing before the above-entitled court, may be sent up to the United States Circuit Court of Appeals for the Ninth Circuit as original exhibits for the apostles on appeal and need not be printed in said court of appeals.

DENMAN & ARNOLD,

Proctors for Libelant.

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Respondent.

It is so ordered by the Court.

Dated April 3, 1917.

M. T. DOOLING,

Judge.

[Endorsed]: Filed Apr. 3, 1917. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [32]

**Certificate of Clerk U. S. District Court to Apostles
on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 32 pages, numbered from 1 to 32, inclusive, contain a full true, and correct transcript of certain records and proceedings, in the cause entitled Leggett Steamship Company, a Corp., Libelant, vs. The San Francisco & Portland Steamship Company, a Corp., Respondent, No. 15,675, as the same now remain on file and of record in this office, said transcript having been prepared pursuant to and in accordance with "Prae-cipe for Apostles on Appeal" (copy of which is embodied in this transcript), and the instructions of the attorneys for respondent and appellant herein.

I further certify that the cost for preparing and certifying the foregoing Apostles on Appeal is the sum of Fourteen Dollars and Twenty Cents (\$14.20), and that the same has been paid to me by the attorneys for appellants herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 6th day of April, A. D. 1917.

[Seal]

WALTER B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk. [33]

[Endorsed]: No. 2970. United States Circuit Court of Appeals for the Ninth Circuit. San Francisco & Portland Steamship Company, a Corporation, Appellant, vs. Leggett Steamship Company, a Corporation, Appellee. Apostles on Appeal. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed April 6, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

No. —.

LEGGETT STEAMSHIP COMPANY, a Corpora-
tion,

Appellee,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY, a Corporation,

Appellant,

**Stipulation and Order Extending Time to and In-
cluding March 28, 1917, to File Record and
Docket Cause.**

IT IS HEREBY STIPULATED AND AGREED
by and between the respective parties hereto that

34 *San Francisco & Portland S. S. Company*

the time for printing the record and filing and docketing this cause on appeal in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is, hereby extended to and including the 28th day of March, 1917.

Dated March 8, 1917.

WILLIAM DENMAN,
DENMAN & ARNOLD,
Proctors for Appellee.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Appellant.

It is so ordered.

Dated March 8, 1917.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. Leggett Steamship Company, a Corporation, Appellee, vs. San Francisco & Portland Steamship Company, a Corporation, Appellant. Stipulation. Filed Mar. 8, 1917. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

LEGGETT STEAMSHIP COMPANY, a Corporation,
Appellee,

vs.

SAN FRANCISCO & PORTLAND STEAMSHIP
COMPANY, a Corporation,
Appellant,

Stipulation and Order Extending Time to and Including April 6, 1917, to File Record and Docket Cause.

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the time for printing the record and filing and docketing this cause on appeal in the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is, hereby extended to and including the 6th day of April, 1917.

Dated March 28, 1917.

W. S. BURNETT,
DENMAN & ARNOLD,
Proctors for Appellee.

IRA A. CAMPBELL,
McCUTCHEN, OLNEY & WILLARD,
Proctors for Appellant.

It is so ordered.

Dated March 28, 1917.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. Leggett Steamship Company, Appellee, vs. San Francisco & Portland Steamship Company, etc., Appellant. Stipulation and Order Under Rule 16 Enlarging Time to and Including Apr. 6, 1917, to File Record Thereof and to Docket Case. Filed Mar. 28, 1917. F. D. Monckton, Clerk.

No. 2970. United States Circuit Court of Appeals for the Ninth Circuit. San Francisco & Portland S. S. Co. vs. Leggett S. S. Co. Two Stipulations and Orders Under Rule 16 Enlarging Time to Apr. 6, 1917, to File Record Thereof and to Docket Case. Refiled Apr. 6, 1917. F. D. Monckton, Clerk.

United States Circuit Court of Appeals

For the Ninth Circuit

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY
(a corporation), owner of the American Steam-
ship "Beaver",

Appellant,

vs.

No. 2969

LEGGETT STEAMSHIP COMPANY (a corporation),
claimant of the Steam Schooner "Necanicum",
her engines, boilers, boats, tackle, apparel and
furniture,

Appellee.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY
(a corporation),

Appellant,

vs.

No. 2970

LEGGETT STEAMSHIP COMPANY (a corporation),

Appellee.

BRIEF FOR APPELLANT

Filed

MAY 21 1917

F. D. Monckton,

Clerk.

EDWARD J. McCUTCHEN,

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Appellant.

Filed this.....day of May, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

IN THE
United States Circuit Court of Appeals

For the Ninth Circuit

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY
(a corporation), owner of the American Steam-
ship "Beaver",

Appellant,

vs.

LEGGETT STEAMSHIP COMPANY (a corporation),
claimant of the Steam Schooner "Necanicum",
her engines, boilers, boats, tackle, apparel and
furniture,

Appellee.

No. 2969

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY
(a corporation),

Appellant,

vs.

LEGGETT STEAMSHIP COMPANY (a corporation),

Appellee.

No. 2970

BRIEF FOR APPELLANT.

Statement of Facts.

The steamer "Beaver", on a voyage from Astoria to San Francisco, and the steamer "Necanicum", en

route from San Pedro to Astoria, were in collision on the 30th day of October, 1913, off the Coast of California. Thereafter appellant, as owner of the "Beaver", libeled the "Necanicum", and appellee, as owner of the "Necanicum", instituted an action *in personam* against appellant. The cases were consolidated and tried before Judge Dooling, who rendered his opinion on the 10th day of December, 1915, dismissing the libel against the "Necanicum" and holding appellant responsible for the damages suffered by appellee, on the ground that the "Beaver" was negligent in proceeding at the rate of 14.7 knots per hour in the fog. The court held that but for such speed and the resulting momentum, due to her size and weight, the collision would not have occurred, and that the speed prevented the rectification, before it was too late, of whatever error arose from confused or contradictory signals. Thereafter appeals in both cases were taken by appellant. A stipulation was entered into consolidating the causes for hearing in this court.

Specifications of Errors.

The assignment of errors will be discussed with respect to the following specifications under which the various assignments are grouped for convenience.

I.

The "Necanicum" was in fault for the collision with the "Beaver" in that she was proceeding in a fog at an immoderate speed.

Assignment of Errors II, III, VIII and IX in Cause No. 2969; 1, 2, 3, 4, 14 and 15 in Cause No. 2970.

II.

The "Necanicum" was in fault for the collision in that she altered her course to port instead of to starboard, and failed to stop in time to prevent the collision.

Assignment of Errors I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XX, XXI, XXII, XXIII, and XV in Cause No. 2969; 1, 5, 6, 7, 8, 9, 10, 11, 12, 14 and 16 in Cause No. 2970.

III

The "Beaver" was not in fault for the collision in that she was not proceeding at an immoderate speed if the court should find that a fog did not prevail.

Assignment of Errors III, XIV, XV, XVI, XVII, and XXIV in Cause No. 2969; 13, 14, 17 and 19 in Cause No. 2970.

Argument.

The steamer "Beaver", south bound from Astoria to San Francisco, and the steamer "Necanicum", north bound from San Pedro to Astoria, came into collision with each other on the 30th day of October, 1913, at a point from 21 to 25 miles south of Pt. Arena on the Coast of California. (Ap. 40, 287). The two vessels were nearly on parallel courses, that of the "Beaver" being about S. E. $\frac{1}{2}$ E. and that of the "Necanicum" approximately N. W. $\frac{1}{2}$ W. (Exhibit 11, Log Book

Entry). The collision occurred at about 2:18 p. m. (Ap. 77, 287), the "Necanicum" striking the "Beaver" on the latter's port bow at an angle of approximately 45° at a point 12 feet abaft the stem.

Notwithstanding that the officers and crew of the "Beaver" testified that the fog had lifted so that immediately prior to the collision they were able to see the "Necanicum" at a distance ahead of about a mile (Ap. 293) and that the officers of the "Necanicum" likewise stated that they saw the "Beaver" when she was from one-half (the master Ap. 134-6) to three-quarters of a mile ahead and the same distance to starboard (the mate Ap. 71), the District Court, in a brief opinion, found that a fog was prevailing and held the "Beaver" in fault for proceeding at a speed of 14.7 knots per hour. That both vessels were in a fog is seemingly borne out by the fact that both claim to have been blowing their fog horns a few moments before the actual impact, and by the testimony of the only disinterested witness called, Mr. Theodore J. Hewitt, a member in high standing of the Portland, Oregon, bar, who described the prevalence of fog in the following words:

"Q. Now, what was the condition of the weather at that time?

A. Well, the weather had been very nice during the forepart of the day and up until just a little while before two o'clock, when we ran into a fog bank,—it seemed kind of to roll up onto us, or we ran into it; rather dense, not very dense, *but quite a heavy fog bank.*" (Ap. 186-7).

I.

THE "NECANICUM" WAS IN FAULT FOR THE COLLISION WITH THE "BEAVER" IN THAT SHE WAS PROCEEDING IN A FOG AT AN IMMODERATE SPEED.

The "Necanicum" was proceeding in the fog at full speed.

If fog was prevailing, then confessedly the "Beaver" was in fault for proceeding at approximately full speed, for she was thereby in breach of Article 16 of the International Rules for the Prevention of Collisions, providing:

"Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions",

and the District Court was right in holding her liable for the collision. But, unless Article 16 is to be abrogated and not to be impartially applied to all steam vessels, and unless every decision of the courts interpreting the rule is to be set aside and disregarded, then *the "Necanicum" was equally in fault*, and the District Court erred in not so holding, *for she too was proceeding at full speed*. This appears from the following testimony of her mate, who was in charge of her navigation from 12:30 o'clock to the time of collision, and from that of her master and engineers.

The mate:

"Q. I don't see any notation in your log of your having reduced your speed from one o'clock in the morning. Don't you note your reductions of speed?

A. Yes, sir.

Q. *Were you running at full speed all that time?*

A. *My watch was.* I am not responsible for the second mate's log.

Q. You were running full speed from the time you went on the bridge at 12 o'clock up to the time of the collision?

A. *What we go by full speed is that the telegraph was on full;* in foggy weather it is customary for the engineer to reduce *slightly* during the time fog signals are going; that is to avoid when you stop the popping off of steam.

Q. Don't you note in your log book any changes of speed you give to the engine-room?

A. Not in all cases; *if we change the speed on the telegraph, if we direct it, we note it.*

Q. *You gave no direction of reduced speed at all?*

A. *I gave none;* whether the captain or second mate did, I don't know.

Q. I am speaking about yourself.

A. I did not.

Q. You were running along your course at regular full speed with your telegraph set at full speed?

A. There was a *slight* reduction in the engine-room.

Q. You do not know anything that happened in the engine-room at all, do you?

A. I have a very good idea it was reduced.

Q. Who told them to reduce the speed?

A. It is their duty.

Q. *Did you ever tell them to reduce the speed?*

A. *I never had occasion to, they had that much sense to do it.*

Q. Will you say you never told them to reduce the speed?

A. No, sir." (Ap. 80).

* * * * *

"Q. *What speed were you making at the time you sighted the 'Beaver'?*

A. *I should judge about eight knots."* (Ap. 84).

The master:

“Q. What speed had you been running in that fog during the morning?

A. Going about seven and a half or eight knots.

Q. *The telegraph was set at full speed all the time, was it not?*

A. *Yes, sir*; the telegraph was at full speed, but we had an understanding with the engineers always that when fog set in they were to cut her down so that——

Q. (Intg.) Did you give them any orders on this particular day to cut them down?

A. I had.

Q. On this particular day you had?

A. Yes, sir.

Q. How did you communicate your orders?

A. By whistle from the bridge.

Q. By whistle from the bridge?

A. Telephone from the bridge, telephone tube.

Q. *What did you say to them?*

A. *Foggy, and to keep her so she would not pop when we stopped the vessel. You did not get my meaning. The standing order of the ‘Necanicum’ was this: in foggy weather when we start to blow fog-whistles they were to cut the steam down so if I stopped the vessel immediately that the vessel would not pop; that is, her safety valve would not break while we were listening for a blast of another vessel, and that order had been carried out all the time I was master of that ship.*

Q. *How much reduction in steam pressure would that mean?*

A. *I do not really know; I am not an engineer.*

Q. If those were the standing orders, why did you give a special order this day?

A. Just saying it was thick fog and to comply with the orders I had given sometime before that.

Q. Have you a distinct recollection of having telephoned down to the engine-room and having given that order this day?

A. I have.

Q. In view of the fact that you had given standing orders?

A. *Somewhere about 10 o'clock I had whistled down and told them it was foggy, getting foggy; it looked as though it was going to get foggy and not to press her too hard.*

Q. *Had you given any orders subsequent to 10 o'clock in the morning?*

A. *No, sir, I had not.*

Q. *How would the man in the engine-room know it was foggy or not?*

A. *He would know by hearing the whistle.*

Q. *By hearing the whistle?*

A. *Yes, sir.*

Q. *And he was supposed to control himself by that whistle?*

A. *Yes, sir of course; unless he was told otherwise.*

Q. *He was not told otherwise after 10 o'clock in the morning?*

A. *He was told at 10 o'clock.*

Q. *I said after?*

A. *It was not necessary.*

Q. *Was it thick fog from 10 o'clock on?*

A. *It was.*

Q. *Up to what time?*

A. *Two o'clock along about that neighborhood.*

Q. *Two o'clock?*

A. *Yes, sir."* (Ap. 127-129).

* * * * *

“Q. *That is about the full speed of that vessel, eight miles?*

A. *That is her limit, unless you set sail on her and drove her before a heavy northwest, and then you might get eight and a half out of her.*

Q. *Captain, from the time you passed Point Reyes up to the time you first sighted the ‘Beaver’ had you had fog all the time?*

A. *More or less, yes; banks of fog.*

Q. *You maintained the same speed right along during that period?*

A. Not when the fog was thick.

Q. *Why don't your log show the reduction of speed?*

A. *Well, we have standing orders on the vessel—*

Q. This is simply then a presumption on your part or an assumption from your standing orders?

A. My standing orders are always carried out on a vessel strictly.

Q. How did you know they were carried out on this morning?

A. I know that they were.

Q. How?

A. Prior to the time of the collision I had stopped the vessel at different times.

Q. For what purpose?

A. To ascertain the position of some other approaching vessel.

Q. What other vessel?

A. We did not see them in the fog.

Q. Don't you know in the fog when you pass vessels?

A. No, sir, we do not know.

Q. How many vessels did you pass that morning?

A. I could not say.

Q. Have you any recollection at all?

A. I would say several.

Q. Why, don't you note in your log when you stop for passing vessels?

A. Well, we just stop the engine—I presume the engineer's log will show that.

Q. Why don't you show it on your log when you stop your engines for fog whistles?

A. It is not customary.

Q. Don't you ever do it?

A. It is not customary.

Q. I am asking you if you don't ever do it?

A. If I was on a fast running vessel I would; on a slow vessel like mine I do not because we do not go too fast at any time. My vessel is a very slow vessel, the slowest on the coast. To

continue answering your question I will say how I know that the steam was reduced is when I had stopped the vessel she did not pop; in other words, she did not blow off any steam, whereas if she was going along at full speed with the steam turned on if I stopped her immediately she would pop right away; that is, her safety valve would work." (Ap. 153-155).

The assistant engineer:

"Q. Where were you at the time of the collision—on watch?

A. On watch; yes, sir.

Q. Did you receive any bells at any time prior to the collision?

A. No, sir.

Q. Did you receive any orders of any kind prior to the collision regarding your engines?

A. No, sir.

Q. Now, understand me, I am speaking—well, within five minutes of the collision, did you receive any orders affecting your engines?

A. No, sir.

Q. Did you do anything to your engines affecting your engines?

A. No, sir.

Q. Do you understand me, Mr. Clough? Did you do anything to your engines prior to the collision? Were your engines reversed prior to the collision?

A. Before the collision?

Q. 'Prior'—I guess you don't understand the word. Did you get any orders from the bridge before the two vessels came together?

A. Yes, sir; I got 'Full speed astern.'

Q. What time did you get that?

A. 2:16 in the afternoon.

Q. How long was that before the collision?

A. That was about two minutes.

Q. About two minutes before the collision?

A. Yes, sir.

Q. *Had you had any orders prior to that time?*

A. *No, sir.*

* * * *

Q. You answered here right along that you made no changes or got no orders prior to the collision. What did you mean by that?

A. Well, *I thought you wanted to know whether I got any orders half an hour or more before the collision, or something like that.*" (Ap. 616-617).

* * * *

"Q. *How many pounds of steam did you have on that day?*

A. *150 pounds.*"

The chief engineer:

"Q. *How much steam pressure did you have on that day?*

A. *150 pounds.*

Q. *Do you know what speed that will develop on her?*

A. *Why, about 8; maybe a little better. 8 knots, maybe a little better than that.*

Q. What is the maximum amount of steam that you carry?

A. *160.*"

* * * *

"Q. Now, you said that your maximum steam pressure on the vessel was 160 pounds?

A. Yes.

Q. I want you to look at your log and tell me what the customary steam pressure is that you carry on that vessel. *When you mention that your maximum pressure was 160 pounds, do you mean that her safety valve is set to blow off at 160?*

A. *That is what she blows off at, yes.*

Q. I want you to look through from the time that you left San Pedro on October 26th up to the time of collision and tell me what steam pressure you were carrying right along.

A. Well, *I was carrying 150.*

Q. *Right along, were you not?*

A. *Yes, You see we log 150 pounds there; we give the fireman when we are running along 3 or 4 pounds to go by, that is all; it is logged that way.*

Q. *That is the steam pressure under which you run your vessel day in and day out, 150 pounds?*

A. *Yes, in a fog.*

Q. Did you have foggy weather from San Pedro all the way up the coast?

A. Not all the time, but it was foggy.

Q. *Show me in your book here where you had more than 150 pounds pressure during the time it was not foggy?*

A. *I do not say we did.*

Q. Why did you say a moment ago that you carry 150 pounds because it was foggy?

A. We never carry over 150 pounds customarily in a fog.

Q. Customarily or not customarily do you carry more than 150 pounds?

A. If it is nice, clear weather and no prospects of fog, we do—at that time when Captain Keegan was on it we did carry more at some times.

Q. *Show me on that log on that voyage where there is an entry of more than 150 pounds of steam?*

A. *I possibly cannot; if there is no entry of over 150 pounds we did not carry over 150. I can show it to you further along in the book.*

Q. Your record in that—

Mr. DENMAN (Intg.) Let him finish. What can you show further along in the book?

A. Where we carried 155.

Mr. CAMPBELL. Q. Do you record in your engine-room log the time when it is foggy and not foggy?

A. No, not always.” (Ap. 651-3).

Thus by the admission of the mate, the “*Necanicum*” was running at full speed during his watch from 12

o'clock to the time of collision. He gave no direction for reduction in speed. He judged his speed to be about 8 knots. The log showed it 8 1/4 knots.

By the confession of the master, who was anything but an open and frank witness, he gave no orders subsequent to 10 o'clock in the morning, when he says that he whistled down to the engine-room and told them (supposedly the engineers then on watch) that it looked as though it were going to get foggy and *not to press her too hard*. Eight miles according to the master *was about the full speed of the "Necanicum":*

"Q. What is about the full speed of the vessel, eight miles?

A. *That is her limit, unless you set sail on her and drive her before a heavy northwest, and then you might get eight and a half out of her."*

Now if any credence is to be attached to the testimony of the master, and whatever may be thought of his credibility he certainly was not wanting in any endeavor to clear his vessel of blame, *the "Necanicum's" full speed was about eight knots, and no order for any reduction in speed had been given at any time, only, at most, a notification of approaching fog and a caution at 10 o'clock not to press her too hard.*

From the testimony of the engineer on watch at the time, he received no bells prior to the collision (not including those at the moment of impact). He carried a steam-pressure of 150 pounds, *the same pressure that had been consistently carried throughout the voyage, fog or no fog.*

And lastly, by the testimony of the chief engineer, the "*Necanicum*" carried a steam pressure on that day of 150, which developed a speed of about 8 knots, maybe a little better than that. Eight knots according to the master was her limit, unless sail was set on her and she was driven before a heavy northwest. 160 pounds was the maximum steam pressure she could carry, and yet the chief engineer could turn to no place in the engine-room log and find a record of more than 150* pounds on that voyage.

A record could not be clearer of a steamer running at her full speed in a fog, without no attempt at moderation. And yet we are not dependent upon the testimony of the "*Necanicum*'s" crew, for indisputable evidence of her speed is found in her log book. From 8:40 a. m. to 9:12 a. m., a space of 32 minutes, the "*Necanicum*" ran by her log a distance of $4\frac{1}{2}$ knots (435 to $439\frac{1}{2}$), at an average speed of $87\frac{1}{16}$ knots per hour; from 9:12 to 12 o'clock, two hours and 48 minutes, she ran $24\frac{1}{2}$ knots ($439\frac{1}{2}$ to 464) at an average speed of $8\frac{3}{4}$ knots per hour; from 12 to 2 p. m., 2 hours, she ran $17\frac{3}{4}$ knots (464 to $481\frac{3}{4}$) at an average speed of $8\frac{7}{8}$ knots per hour; and from 2 to 2:20 p. m., 20 minutes, she covered a distance of $2\frac{3}{4}$ knots ($481\frac{3}{4}$ to $484\frac{1}{2}$) at an average speed of

* An examination of the "*Necanicum*'s" log book (Exhibit 11) will reveal that a crude attempt was made to change the time of collision from 2:20 to 2:25 by converting the 0 into a 5. From 2 p. m. until time of collision, the "*Necanicum*" ran $2\frac{3}{4}$ knots ($481\frac{3}{4}$ to $484\frac{1}{2}$). If the time of collision could be delayed from 2:20 to 2:25 and the running time thereby increased from 20 to 25 minutes, the average speed would have been reduced from $8\frac{1}{4}$ to 6.6 knots per hour. But the District Court found the average speed $8\frac{1}{4}$. The attempted fraud in the log is too palpable for comment.

8 $\frac{1}{4}$ knots per hour. This latter was the speed that the District Court found that she was making. During all of that time a southeast (fair) wind was blowing and fog prevailing. *With her master testifying that 8 knots was her limit unless sail was set, and with the chief engineer stating that with a steam pressure which she carried throughout the voyage, she would develop a speed of about 8 knots, the log established beyond all question that the "Necanicum" was proceeding in the fog at full speed in excess of 8 knots per hour.*

In the light of those facts, extracted solely from "Necanicum's own records and elicited from her officers, the condemnation of the "Necanicum" as in fault for the collision must follow, unless, as we have said, a settled rule of law is to be abrogated and the decisions of the courts are to be waived aside and disregarded in a special dispensation to the "Necanicum" for which no justification exists. This, the District Court did with no word of comment or explanation in its brief opinion upon the navigation of the "Necanicum".

Moderate speed which the law prescribed required a reduction from ordinary full speed.

Article 16 provides:

*"Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions. * * **

And moderate speed in the fog has been held, without exception, to require a reduction in speed, a speed

substantially less than full speed. This appears from the following leading decisions:

In

The City of New York, 15 Fed. 624,

the steamship "City of New York", capable of making a maximum speed of 13 to 14 knots, was in collision off the New Jersey coast with a sailing vessel while proceeding in a fog at 10 knots. District Judge Brown regarded her speed of ten knots as substantially full speed. He laid down the rule in unequivocal terms that the *moderate speed* prescribed by the statute means *something materially less than full speed*, saying:

"The fog, though not very dense, was sufficient to prevent any observation of the lights, or of the course of vessels, more than about an eighth of a mile distant, and it therefore diminished greatly the ordinary means of avoiding danger. The authorities are quite uniform in requiring a diminution of speed under such circumstances. *Whatever 'moderate speed' may be*, under given circumstances, having reference, as it doubtless does, to the steamer's ordinary speed and her ability to stop quickly, the density of the fog, and the means which vessels have of observing each other, so as to avoid danger, *it is, at least, something materially less than that full speed which is customary and allowable when there are no obstructions in the way of safe navigation. To continue at full speed, therefore, as the steamer in this case substantially did, until the bark was in sight, was a clear violation of the statutory obligation to go at a moderate speed.*"

Can this court say that the "Necanicum" complied with the rule of that case, when she was proceeding in the fog with no reduction in speed?

In

The State of Alabama, 17 Fed. 847,

a collision occurred about thirty miles off the eastern end of the Banks of Newfoundland. The average speed of the steamer found by the court was *eight knots*. There was no satisfactory testimony as to the steamer's ordinary full speed. The court held that if the steamer was going at reduced speed, *the burden lay on her to show that fact to her own justification, and as no such testimony was offered, he assumed that there was no reduction, and that the steamer was going at her ordinary full speed, which was about 8 to 8½ knots per hour.*

In condemning the steamer, District Judge Brown said:

“The failure to slacken speed in this fog, must be set down as one fault in the steamer. *Although the fog was not dense, it was nevertheless evidently such a fog as materially to interfere with the timely observation of other vessels, and therefore increased materially the dangers of navigation. To go at full speed in such a fog is not a compliance with rule 21, which requires steamers in a fog to go at moderate speed. * * * No steamer's speed is moderate in the sense of rule 21 so long as she is going at her ordinary full speed.*” (Italics ours.)

Certainly the “Necanicum” did not show any reduction in her ordinary full speed. The evidence was all to the contrary. If, then, as Judge Brown said, no steamer's speed is moderate in the sense of rule 21 so long as she is going at her ordinary full speed, *it necessarily follows that the “Necanicum” was not*

in compliance with the statutory rule, and her condemnation must follow. The District Court made no attempt to justify the "Necanicum's" being removed beyond the application of this settled principle of collision law.

The same rule was stated by Judge Coxe in

Clare, Adm'x etc. v. Providence & S. S. Co.,
20 Fed. 535, 537,

in the following words:

"This position would quite likely be well founded if the only questions decided were questions of fact, but it will be observed that in several of the cases referred to, some of which were not presented to the court upon the trial or argument, a construction is placed upon rule 21, that *in all circumstances 'moderate speed' means less than usual speed.*
* * *

"The conclusion derived from these authorities is: That '*moderate speed*' means *moderated speed; reduced speed; less than usual speed.*' (Italics ours).

It was reiterated by Judge Brown in

The Pennland, 23 Fed. 551, 555,

as follows:

"*Assuming that there was a sufficiently dense haze or fog, as her witnesses assert, to require the sounding of the fog whistle at the time when the first whistle was given,—viz., the third blast before the collision,—it was her duty to go at moderate speed under rule 21; that is, reduced speed.*" (Italics ours.)

And again, in

The City of Atlanta, 26 Fed. 456,

the court said of the rule, in condemning "*The City of*

Atlanta” for proceeding at nine knots 50 miles off the Virginia coast:

“The average full speed of The City of Atlanta was nine knots. Up to the time when the fog horn of the Foley was heard, she had not materially slackened her speed on account of the fog. * * *

“*Moderate speed means ‘reduced speed’* * * * The City of Atlanta did not *substantially* reduce her speed at all, although she was sounding fog signals. She was sailing, therefore, in violation of article 13 of the rules of navigation.” (Italics ours.)

In

The Britannic, 39 Fed. 395,

Judge Brown held both the “Celtic” and the “Britannic” in fault for running in violation of the statute because they were under *substantially* full speed in a fog, for each was proceeding at a speed but one knot less than full speed. *What justification is there, then, for holding the “Necanicum” free from fault when she was proceeding, as the record of her log shows, at her ordinary full speed?*

The same court commented at length upon the rule in

The Normandie, 43 Fed. 151, 157,

saying:

“With improvements in steam engines, and increased facilities for handling, it is not impossible that one-half the maximum speed when full power is held in reserve for immediate use in emergencies may come to be held a moderate speed, even in a dense fog, in those parts of the high seas where other vessels are not specially liable to be met. But the speed of the ‘Normandie’ in this case was more than one-half of her maximum speed. *There is no case in the courts of this*

country where a speed of two-thirds of the maximum speed under such circumstances as the present, has been held to be moderate speed within article 13."

Later, in

The Niagara, 77 Fed. 329,

Judge Brown enforced the rule in a case arising out of a collision off the coast of Virginia, saying of its application to a steamer going *nearly* at full speed:

"The speed of the steamer was from nine to ten knots or nearly her full speed, and the fog was dense. Though the steamer was a little off from the straightest route, she was not in an unfrequented part of the ocean, and no precedent warranted holding nearly full speed of from 8 to 10 knots to be the 'moderate speed' that the statute requires. It must, therefore, hold the steamer liable."

In

Spencer on Marine Collisions,

the author states the rule in the following language:

"The courts, however, hold that no steamer's speed is moderate in the sense of the rule so long as she is going at her *ordinary* full speed."

The rule is unequivocally stated in

25 Amer. & Eng. Encyc., at 986,

as follows:

"Ordinary full speed is *never* considered moderate speed." (Citing cases).

The rule is thus so well established and so clear that the *moderate speed prescribed by the statute means reduced speed* that nothing can be gained by further

citation of cases with which the reports are replete. This court, however, recognized its existence in its late decision in

The Oceania Vance, 233 Fed. 77,

wherein it held a sailing vessel at fault for proceeding at a speed of $6\frac{1}{2}$ to 7 knots an hour, Circuit Judge Ross saying:

“The same rule in respect to the *necessity of slackening speed in foggy weather* that applies to steamers is equally applicable to sailing vessels.” Citing *The Chattahoochee*, 173 U. S. 540. (Italics ours.)

If then, fog prevailed at the time of the collision between the “Beaver” and “Necanicum”; if under those circumstances both vessels were by a statutory rule of law required to go at a moderate rate of speed; if moderate speed means a reduced speed, less than ordinary full speed, as all the decisions hold wherein the question has received consideration; and if, as the record from the lips of her officers and from her log book undeniably shows, the “Necanicum” was going at her ordinary full speed,—on what ground is this court at liberty to depart from adjudications which have so finally settled the rule of law? No reason exists, we submit, for making the “Necanicum” a special exception to the rule, and yet that is precisely what the lower court did with no citation of precedent and with no word of justification, or even of explanation. It was error, which in justice this court should correct.

Speeds of less rates than that of the "Necanicum" have been held excessive.

By the master's testimony, the "Necanicum's" speed at the time the "Beaver" hove in sight was 8 knots an hour; by her log, her average speed for the twenty minutes immediately preceding the collision was $8\frac{1}{4}$ knots an hour, and for the two hours previous to that $8\frac{7}{8}$ knots an hour, before a southeast wind. Throughout that time, a fog prevailed, if credence is to be given to her log book entries, as must be done against her. *Such speed has been condemned time after time as excessive.*

In the latest decision of this court,

The Oceania Vance, supra,

the sailing vessel was held in fault for a speed of $6\frac{1}{2}$ to 7 knots. And the court remarked that

"Speeds much less than 6 knots have frequently been condemned." Citing cases. (Italics ours.)

What then of a speed of $8\frac{1}{4}$ knots in a fog? Can it be possible that this court will sanction and announce to the shipping world a rule whereby a steam vessel proceeding at $8\frac{1}{4}$ knots, ordinary full speed, in a fog in the path of vessels passing up and down the frequented California coast, shall be held to be navigating within the statutory rule, mandatorily prescribing "moderate speed"? If so, what becomes of the precedent of

The Oceania Vance,

going at a rate of from $11\frac{1}{4}$ to $13\frac{3}{4}$ knots less, and of this court's decision in

The Belgian King, 125 Fed. 869,

wherein, in a collision occurring in the vicinity of the one in the present case, Circuit Judge Morrow, delivering the opinion of the court, held that the "Belgian King" was not going at a moderate rate of speed when proceeding at *half speed* (not full speed) at 8½ knots an hour?

In

The Michigan, 63 Fed. 280,

the Circuit Court of Appeals for the First Circuit, speaking through District Judge Hughes, said:

"*Five to six knots* an hour is too great a speed to move with in a fog over waters always as *full of vessels* of every kind as the waters at the entrance of the Virginia Capes. * * * (Italics ours.)

In

The Harold, 84 Fed. 698,

District Judge Brown held the schooner "Crockett" liable for a collision with the tug "Harold" because of an immoderate speed of six knots, saying:

"The schooner had nearly all sails set in a fresh wind, and was going at a speed of *six knots*; this plainly was not the moderate or reduced speed required in a fog by Article 13." (Citing cases.) (Italics ours.)

In

In re Clyde S. S. Co., 134 Fed. 95,

District Judge Adams laid down the rule that *six knots* is an excessive speed for a steamship in a fog in a frequented part of the ocean, and charges the vessel

with fault where collision occurs (the court cited numerous cases).

In

The Furnessia, 137 Fed. 955,

where a collision occurred between two vessels approaching New York at night in a fog, 15 miles east of Fire Island lightship, the court held *six knots* to be an excessive speed. Of it District Judge Adams said:

“If her speed was only *six knots*, it was too much in such a fog.” (*Italics ours.*)

In

The Tremont, 160 Fed. 1016,

a case arising out of a collision on Puget Sound, District Judge Hanford held the “Tremont” in fault for proceeding at the rate of *six miles* per hour in the fog. The decision was affirmed by this court in 161 Fed. 1.

The Circuit Court of Appeals for the Second Circuit in

The Delaware, 213 Fed. 214,

condemned the steamship “Delaware” for proceeding in the fog at a speed of $6\frac{1}{4}$ *knots* while entering New York Bay.

And the Supreme Court of the United States in

The Steamship Martello v. Willey, 153 U. S. 64, 38 L. ed. 637,

adjudged the steamship “Martello” in fault for a collision with the “Willey” because she was proceeding at an immoderate rate of speed of from $5\frac{1}{2}$ to 6 *knots* near the entrance to New York harbor.

A speed of seven knots has been frequently condemned as immoderate.

In

McCabe v. Old Dominion S. S. Co., 31 Fed. 234, a collision occurred a short distance south of Scotland Lightship off the New Jersey coast during a fog, between the steamships "Seneca" and "Wm. McCabe".

In holding the "Seneca" at fault, the court said:

"The admitted speed of the 'Seneca' is *seven miles*. The evidence proves that it must have been greater, though it is impossible to fix the exact rate. Enough has been said to condemn her for negligence in this respect, and to make her *prima facie* responsible for the collision." (Italics ours.)

Again, in

The Wyanoke, 40 Fed. 702,

seven knots was held to be too great a speed in a fog on the open sea off Cape May. The court said that seven knots in a dense fog at night was an immoderate speed for a steamer whose full speed was only 10 to 11 knots.

In

The Catalonia, 43 Fed. 396,

a collision occurred 30 miles northeast of Highland light in a thick fog between the "Catalonia", bound on a voyage from Liverpool to Boston, and the "Rebecca A. Taulan," proceeding from Richmond, Maine, to Philadelphia. Both vessels were held in fault for the collision, the steamer being condemned for going at an immoderate speed of *seven knots*.

Seven knots was likewise condemned by the Supreme Court of the United States as excessive in

The Pennsylvania, 19 Wall. 125, 22 L. ed. 148, wherein a collision occurred 200 miles off Sandy Hook.

An *eight knot* speed has been held excessive.

In

The City of Panama, Fed. Cas. 2764, District Judge Hoffman, sitting in the court below, condemned the steamer for proceeding at the rate of *eight miles* an hour in a fog in the usual track of vessels approaching San Francisco harbor from ports to the northward.

In

The Westphalia, Fed. Cas. 17460, District Judge Benedict held the steamship "Westphalia" liable for a collision in the English Channel in a fog in the daytime because she was proceeding at from 8 to 9 knots. The court said that such a speed was unlawful, and that even a speed of *seven knots*, could not be justified.

Eight miles an hour was held to be excessive in

The Leland, 19 Fed. 771, wherein the court condemned the steamer for proceeding at that rate, 17 miles off the west shore of Lake Michigan.

In

The State of Alabama, 17 Fed. 847, the court held the steamer in fault for maintaining a speed of from 8 to 8½ knots at the time of a collision

occurring 30 miles off the eastern end of the Grand Bank of Newfoundland.

The weight of authority thus condemns the speed of the "Necanicum" as excessive.

With vessel after vessel held in fault for going at speeds less than their normal full speeds, and below the ordinary full speed at which the "Necanicum" was proceeding, the latter should be deemed in fault. To hold, on the one hand, that a fog was prevailing which thereby brought into operation rule 16, requiring a moderate speed on the part of the "Beaver", and, on the other hand to say that the "Necanicum" was not likewise required to obey the mandate of the rule by reducing her speed, but could lawfully proceed at the same rate as before the fog set in, would not only constitute a biased and partial application of the rule, but would effectually detract from the obligation of the rule as it has been established and enforced by every court, save in the present instance.

To uphold the decision of the lower court in the face of the undisputable admissions of full speed will work chaos where uniformity is essential to safe navigation. If this court shall say to the shipping world that the "Necanicum" may go uncondemned despite the fact that she confessedly did not reduce her speed to moderate, although the rule is all-inclusive in its scope, for by its terms it applies to *every* vessel (not every vessel *but* the "Necanicum"), its act will be the pronouncement of a new rule in conflict with the settled adjudications of every other court.

The rule is statutory, having been adopted by an Act of Congress of August 19, 1890 (26 Stat. at L., p. 320, Chap. 802), and becoming effective by a proclamation of the President (26 Stat. at L., p. 1250) on the 1st day of July 1897. The "Necanicum" by her violation of it brought herself within the application of the burden of proof rule first laid down by the Supreme Court in

The Pennsylvania, supra,

and recently reapproved by the Supreme Court in

Lie v. San Francisco & Portland S. S. Co., U. S.

Adv. Ops. 1916, at p. 270,

affirming a judgment of this court in

The Beaver, 219 Fed. 134,

wherein the court said:

"But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing, not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been."

By her failure to reduce her speed to moderate, the "Necanicum" thus had cast upon her the burden of showing not only that it probably was not, but that it could not have been, one of the causes of the collision. Manifestly, she has not sustained this burden, because it clearly appears that had she been proceeding at a reduced speed, the collision would never have occurred. As it was, it only failed of being averted by the nar-

rowest possible margin. She certainly has not shown that the collision would still have occurred if her speed had been reduced. Failing it, she must be held in fault.

II.

THE "NECANICUM" WAS IN FAULT FOR THE COLLISION IN THAT SHE ALTERED HER COURSE TO PORT INSTEAD OF TO STARBOARD AND FAILED TO STOP IN TIME TO PREVENT THE COLLISION.

The "Necanicum" altered her course to port.

The testimony of the master of the "Beaver" was to the effect that he went to the bridge at about five minutes past 2 o'clock in response to a report from the second officer, who was on duty, that it looked like it was going to set in foggy. At that time, he could see three or four miles, and thereafter the fog began coming down light, drifting. At 2:14, he first saw the "Necanicum" and at the same instant it was reported by the lookout (Ap. 287-8, 293). She appeared to be right ahead, a little, if anything, on the port bow (Ap. 293). The automatic fog whistle, a large deep whistle, had been blowing from the time the master went to the bridge, and on seeing the "Necanicum", he ordered it shut off, and thereupon blew the "Necanicum" a one-blast passing whistle (Ap. 295). At the same time, he ordered his helm ported, and waited about 30 seconds for a reply. Not receiving any, he blew a second whistle, and shortly after that, it might have been 30 seconds or thereabouts, they heard a single blast whistle from the "Necanicum" (Ap. 295). The "Beaver" continued to swing to starboard under her ported helm, and, contrary to the whistles which

had been exchanged, the "Necanicum" starboarded her helm, instead of porting it, and began to swing toward the "Beaver". At that time, the vessels were approximately half a mile apart (Ap. 295-7). As soon as the master of the "Beaver" saw the "Necanicum" coming to port toward him under a starboard helm in violation of the whistle, he hard aported, backed the "Beaver" full speed, and blew three whistles (Ap. 296, 303-305). The "Necanicum" continued to swing toward the "Beaver", and finally struck her at about an angle of 45 degrees, approximately 12 feet from the stem (Ap. 296).

The master was corroborated by the lookout in the fact of first seeing the "Necanicum" a little on the port bow, of the passing whistles blown, and of the "Necanicum" altering her course to port and into the "Beaver" (Ap. 449, 451-3). The second officer, on the bridge, likewise testified to calling the master, to the starting of the automatic whistle, to seeing the "Necanicum" coming out of the fog almost ahead, a little on the port bow, and to the subsequent whistles and changes in the "Beaver's" course and speed as stated by the master (Ap. 353-7). The "Necanicum", said the second officer, came toward the "Beaver" under a starboard helm and struck her about 12 feet from the stem on the port bow (Ap. 358-9). The quartermaster, a seaman of 45 years' experience, corroborated the blowing of the automatic fog horn, the two single blast passing whistles and the three reversing whistles blown by the "Beaver", and of the altering of the "Beaver's" course to starboard (Ap. 471-2, 476-9). He saw the "Necanicum" approach at what

he thought was nearly right angles, and strike the "Beaver" (Ap. 473). The chief officer heard the "Beaver's" two whistles, the "Necanicum's" answering whistle, while in his room beneath the bridge (Ap. 432-3). On hearing the bridge telegraph ring, he came on deck and saw the "Necanicum" approaching on the port bow (Ap. 433). From the time he saw the "Necanicum" she was swinging towards the "Beaver" under a starboard helm (Ap. 435).

Thus by all of the officers and crew of the "Beaver" on watch, the "Necanicum" when first observed was approaching slightly on the "Beaver's" port bow. The latter blew a one-blast whistle, indicating an intention to direct her course to starboard and to pass port to port. No response being received, the whistle was repeated, and was thereafter answered by a like whistle from the "Necanicum". Instead, however, of complying with the signal, the "Necanicum" changed her course to port under a starboard helm and struck the "Beaver" on the latter's port bow. The "Necanicum's" alteration of course to port instead of to starboard and her failure to stop precipitated the collision.

The testimony of the officers and crew of the "Necanicum" as to the relative positions of the two vessels when they came into view of each other from the fog, the whistles blown, and the changes in courses, is absolutely contradictory to that of the officers and crew of the "Beaver", save as to two significant facts, viz., the blowing of a one blast whistle by the "Beaver" and the *starboarding* of the "Necanicum's" helm.

The mate of the "Necanicum" testified that he first sighted the "Beaver" 12 to 15 degrees on his starboard bow about seven or eight miles away; that from the course she was then on, she should have passed the "Necanicum" a mile off to starboard; that she was then shut out by the fog and when he next saw her two or three minutes before the collision, her bearing had widened and she was then on the starboard bow between three and four points at a distance of three-quarters of a mile and three-quarters of a mile to starboard, (Ap. 32-3, 42, 54-5). That there may be no mistake as to his exact words, for we are now dealing with probabilities, we quote them:

"Q. After you saw the 'Beaver' seven or eight miles away, about 15 degrees on your starboard bow, so that she would pass you a mile off, as I understand you to say? A. Yes, sir.

Q. How long did you see her?

A. Several minutes.

Q. How many minutes? A. Three or four.

Q. Three or four minutes? A. Yes, sir.

Q. How long was it that she was shut out by the fog?

A. Oh, from shortly after 2 o'clock until the collision occurred—shortly before, about two or three minutes before the collision occurred.

Q. At that time where was she?

A. She was coming down the coast; had she proceeded on her course she should have been about a mile or so inside.

Q. *Where was she at the time you saw her at 2:15, or three minutes before the collision?*

A. *On our starboard bow.*

Q. *Whereabouts was she on your starboard bow?*

A. *I should judge between three and four points; about three.*

Q. How many degrees, about?

A. There are 11 and a quarter degrees to a point.

Q. That was two or three minutes before the collision? A. Yes, sir.

Q. *How far distant was she?*

A. *Oh, in the vicinity of three-quarters of a mile.*

Q. *How far off your starboard bow would that make her?* A. I can figure it out by—

Q. What is your judgment?

A. *Had she proceeded on her course she would have passed three-quarters of a mile.*

Q. That is the time you first saw her?

A. No, sir.

Q. *At the time you saw her two and a half or three points before the collision, how far off was she?* A. Do you mean in miles or feet?

Mr. DENMAN. The question is confusing to the witness.

Mr. CAMPBELL. Q. How far off was she from you at the time you saw her two and a half or three minutes before the collision when she was three points on your starboard bow?

A. *Three-quarters to one mile.*

Q. *Three-quarters to one mile?* A. Yes, sir.

Q. At that time you say her bearing had widened? A. Yes, sir.

Q. How much? A. From 15 to 33 degrees.

Q. *How far ahead of you did you judge her to be at that time?* At the time—what time?

Q. Three minutes before the collision when you saw her three points?

A. *She would be three-quarters of a mile.*

Q. *How far off to one side?*

A. *Between one-half and three-quarters of a mile.”* (Ap. 54-5).

At the time he then saw her, the mate says that he starboarded his helm, blew two blasts of his whistle and received no response, but instead, the “Beaver” ported her helm and changed her course sharply across

the "Necanicum's" bow. This describes a maneuver on the part of a large, fast passenger vessel in the open ocean so unusual and so utterly senseless, for no exigency of situation existed to suggest or necessitate it, that we again take the mate's own words to avoid the possibility of misunderstanding:

"Q. When did you next see her?

A. Two or three minutes previous to the collision.

Q. Where was she when she came in sight?

A. She was on the starboard bow, her bearing had widened.

Q. What, if any, orders did you give at that time? A. At the time I seen her?

Q. Yes? A. *I starboarded my helm.*

Q. What did you say?

A. *Starboard your helm, and sounded two blasts of the steam whistle denoting my intention of passing him on his starboard side.*

Q. Whereabouts on the bridge were you at this time? A. Both sides.

Q. Walking back and forth?

A. Backwards and forwards; yes, sir.

Q. Did you get any response from him?

A. The response was not discernible to the ear.

Q. *Did you see anything from him?*

A. *I seen evidence of steam or something from his whistle, I do not know what it was, making no sound.*

Q. How many blasts as far as indicated by sight?

A. I could not tell, *I surmised it was one.*" (Ap. 33-4).

* * * * *

Q. At that time you blew, as I understand your testimony, two blasts? A. Yes, sir.

Q. She was in plain sight of you?

A. Yes, sir." (Ap. 55).

* * * * *

Q. *You had then heard no response from the 'Beaver'?*

A. *I heard no response, but took it evidently that she sounded one whistle, because she altered her course sharply across the bow.*

Q. Did you see that? A. Yes, sir.

Q. What did you do then?

A. Called the captain's attention to it.

Q. Where was he? A. On the bridge.

Q. Why did you have to call his attention to it?

A. It was my duty; he already seen it, but it was my duty.

Q. What did you say to him?

A. I says, 'What is he going to do; what the hell is he going to do?' I says.

Q. What did the captain do then?

A. Placed his hand on the telegraph and says, 'My God! What is that man going to do?'

Q. What did he do then?

A. When we determined that the vessel was attempting to cross our bow he gave her full speed astern on the telegraph sounding three blasts of the whistle denoting the engines were going full speed astern.

Q. At the time the 'Beaver' altered her course to starboard, did you give the danger signal?

A. She altered her course to port.

Q. She altered her course to starboard?

A. That is port helm.

Q. Is that altering it to starboard?

A. The vessel goes to port.

Q. That is altering her course to starboard under a port helm? A. Yes, sir.

Q. Did you give the danger whistle?

A. Three whistles denoting we were going astern.

Q. At the time the 'Beaver' was from one-half to three-quarters of a mile ahead of you?

A. Yes, sir." (Ap. 58-9).

The "Necanicum's" helm was starboarded, which, the court will bear in mind, would swing her exactly as

those on the "Beaver" testified she did swing. There can be no mistake about the change of helm. We quote the words of the man who ordered it:

"Q. You thought there was going to be a collision?

A. I surely did, the way the other ship acted.

Q. *What was done with the helm of your vessel?*

A. *Starboarded.*

Q. *Starboarded?* A. *Yes, sir.*

Q. *And you swung off to port?*

A. *To port; yes, sir.*

Mr. DENMAN. At what time?

Mr. CAMPBELL. Just a moment. I object to counsel interrupting the cross-examination at this point.

Mr. DENMAN. What time of changing the helm are you referring to?

Mr. CAMPBELL. I seriously object to counsel breaking in on the cross-examination; he knows it is not right.

Q. *What time did you order your helm to starboard, when you blew your two blasts?*

A. *When I blew the two blasts.*

Q. *What was the order you gave?*

A. *Starboard your helm.*

Q. *Did the quartermaster do it?* A. *Yes, sir.*

Q. What kind of steering gear have you got?

A. Rods, ropes and chain.

Q. What kind of a steering apparatus have you?

A. Wheel hand gear.

Q. Hand gear? A. Yes, sir.

Q. Did he alter his course?

A. At what time? Yes, he altered his helm.

Q. Did you alter the course of your vessel?

A. Must have altered it to some extent. The master was on the bridge at that time; I don't know what he did.

Q. Did you watch it?

A. No, sir; the captain was on the bridge in command.

Q. Who gave the order, did you? A. Yes, sir.

Q. Why didn't you watch it?

A. *He put his helm to starboard; I had business other places.*" (Ap. 59-61).

"Q. Your judgment is you did continue to swing to port under a starboard helm?

A. *She had started to swing to port.*

Q. When you left the bridge?

A. I did not leave the bridge when I took up other duties." (Ap. 62).

The master also testified to the "Beaver" being on the starboard side and of altering her course to starboard. We quote him:

"Q. When did you next see the 'Beaver'?

A. About somewhere around 2:20, I would judge.

Q. Where were you when you next saw her?

A. I was on the starboard after-deck of the 'Necanicum'.

Q. Where had you been just before that?

A. In the toilet.

Q. Where is that situated?

A. On the starboard after-deck.

Q. Where was the 'Beaver' when you then saw her with reference to your vessel?

A. *When I again saw her she was on our starboard bow.*

Q. *Whereabouts on the starboard bow, how many points about?* A. *About two points.*" (Ap. 119).

Q. What did you do when you saw the 'Beaver'?

A. *I went on the bridge.*

Q. *Were any signals blown from your vessel to the 'Beaver'?*

A. *When I arrived on the bridge my first officer blew two blasts to the 'Beaver'?*

Q. What, if any, orders were given from your first officer?

A. *I heard my first officer say, 'Starboard your helm.'*

Q. What was done then, or what did you see then?

A. *I saw the 'Beaver' alter her course sharply across my bow.*

Q. What did you do then?

A. I ordered the helm hard aport, and backed the vessel full speed astern; backed my vessel full speed astern. I gave three blasts of my whistle to indicate that I was going full speed astern, or, in other words, that my engine was reversed.

Q. How long was it between the time that the order was given to starboard the helm to your order hard aport with the reversing?

A. Well, *at a rough estimation* I would say about 10 seconds; that is a rough guess.

Q. Was it any considerable lapse of time, Captain?"

"A. No considerable lapse of time; just a rough guess.

Q. Had you in the interim seen the vessel turning to her starboard?

A. *I saw the vessel swing sharply across my bow; our vessel's bow.*

Q. Did she ever get clean across your bow prior to the collision?

A. Well, I would say she was on an angle of about with our keel, I would say 50 degrees across our bow when she struck. Prior to the time of the collision both vessels, I presume, were backing; mine was backing." (Ap. 120-1).

* * * * *

"A. The second time I saw her she was two or more points on my starboard bow; two points I would roughly say, in that neighborhood.

Q. Then you say she began to swing across your bow. Then came the order porting your helm and reversing full speed astern?

A. We saw the 'Beaver' on our starboard bow. When I came out of the toilet I saw the whole starboard side of the 'Beaver' plainly. I then went on the bridge and as *I was approaching the bridge* the first officer gave *two blasts of his*

whistle to the 'Beaver' of the 'Necanicum's' whistle. I then saw the 'Beaver' alter her course sharply across our bow; she answered our two blasts with one; I backed my vessel full speed astern and ordered my helm hard aport." (Ap. 122).

On cross-examination he stated:

"Q. When you saw her the next time did you find her where you expected she would be from what you had seen of her when you left the bridge?

A. When I next saw her I saw her on my starboard bow; I saw her whole starboard side and she appeared to be a little closer than she should have been, but there was plenty of room to pass.

Q. I will again ask you the question. When you saw her the second time was she in the position you expected to find her bearing in mind the position you had last seen her when you left the bridge? A. I have answered that question.

Q. Answer it again. A. She was a little closer.

Q. How much closer?

A. I would say—what do you want, in miles or feet?

Q. Whichever way serves your purpose best.

A. I would say she was closer than I expected to find her.

Q. In your judgment then when you came out of the lavatory you thought she had altered her course? A. I thought she had.

Q. And swung towards you?

A. It struck me she must have in order to get that close to me. However, when I saw her after I came out of the lavatory *I saw her whole starboard side more than half a mile off.*

Q. *That was more than half a mile to starboard to you?* A. *To the starboard of me.*

Q. And how far ahead of you?

A. Bearing about two points I would safely say.

Q. *At what distance ahead?*

A. *I just said half a mile or more.*

Q. *How far to starboard would you say, half a mile?*

A. *I would roughly guess about that; more.*

Mr. DENMAN. I want to ask counsel what he means by 'how far to starboard?'

Mr. CAMPBELL. My question was understood. The witness does not need to wink to his counsel either.

The WITNESS. You asked me that question three or four times over and you do not give me a chance to answer the question.

Mr. CAMPBELL. I will give you all the opportunity you want.

The WITNESS. I am telling you the truth in this matter and nothing but the truth.

Mr. DENMAN. What does counsel mean by half a mile to starboard. Do you mean by that half a mile abeam of the vessel or off; I really do not know.

The WITNESS. I do not know what he means either.

Mr. CAMPBELL. If counsel makes another suggestion to the witness perhaps the witness will follow up the suggestion again.

The WITNESS. I want——

Mr. DENMAN (intg.). Let him put the question and you answer it.

The WITNESS. I want to answer that last question this gentleman asked me. How far would she pass me if she had continued on her course. *She would have passed me half a mile or probably more had she continued on her course.*" (Ap. 134-6).

* * * * *

"Q. *You say you heard an answer to your two whistles, you hearing one whistle from the 'Beaver'?* A. *I did.*

Q. *Distinctly?*

A. *I heard the blast of the whistle.*

Q. *You had no difficulty in hearing it?*

A. *None whatever.*" (Ap. 138).

"A. I was approaching the bridge when Mr. Beckwith blew the two blasts to her.

Q. Where were you when you saw the "Beaver" alter her course?

A. I was on the bridge at the time she pulled herself across our bow, and then gave me one blast.

Q. Did she alter her course before or after she gave you the one blast?

A. She altered her course about the time she gave me the one blast.

Q. Then you were on the bridge at the time you *heard the one blast*? A. *I certainly was, yes.*

Q. Where were you at the time that the two blasts were given by your chief officer?

A. Approaching the bridge." (Ap. 140-1).

"Redirect Examination.

Q. You do not mean to say, do you, that when you see her one-half a mile distant two points on your bow that she will be half a mile distant when she was abeam to you?

Mr. CAMPBELL. Objected to as leading and cross-examination of his own witness.

A. I have not said she was.

Mr. DENMAN. Q. I understood you to say that.

A. All I say is that she had ample room to pass had she continued on her course.

Q. You did say in answer to a question by Mr. Campbell that you saw her one-half a mile distant two points *or* your starboard bow and then you said afterwards to him that she would pass you half a mile and over on your starboard side from that position on a parallel course. I want to ask you—

A. (Intg.). *I never said she would pass me half a mile when she passed me abeam.*

Mr. CAMPBELL. We object to counsel's cross-examination of his own witness. The witness plainly testified as to what his recollection was at that time.

The WITNESS. *I did not say she would pass me half a mile. I said when she was two points she was half a mile or more distant; how much more I would not say. I never did state she passed me half a mile.*

Mr. DENMAN. Q. *My impression is the record will show you made such an answer. I would like to know what your opinion was in regard to the distance she would pass you from the position you last saw her as you stepped out of the toilet.*

A. *I would say she would have passed a good safe distance.*

Q. *Would it be such a distance as is represented on the chart which we put in here?*

A. *It should be at least had she continued, she would have passed me at a good safe distance.*

Q. *On the inside?*

A. *Inside of me. I don't remember having stated at any time the vessel passed me half a mile inside of me when she was abeam of me.*

Mr. DENMAN. *I offer this in evidence as Claimant's Exhibit 1.*

(The chart is marked 'Claimant's Exhibit 1.')
(Ap. 159-161).

* * * * *

Recross Examination.

Mr. CAMPBELL. Q. *What did you mean by stating to me as my recollection is that you did, that when you first saw the 'Beaver' you then judged her to be on such a course that she would pass you about a mile to starboard?*

A. *I figured she would pass me a mile to starboard."* (Ap. 162).

* * * * *

Q. *Is it not a fact that when you first saw her after you came out of the lavatory that you thought at that time that she was in such a position that she would, if she held her course pass you about half a mile distant?*

A. *No, sir; I stated that I saw her about two points, in that neighborhood, on the starboard*

bow, and I saw the whole starboard side of the 'Beaver,' and I figured that if she carried on as she was going, kept her course, she would pass well clear of us. I did not state at any time how far she would pass us.

Q. You said to me on direct examination in answer to my question she would pass you about half a mile? A. When she was abeam?

Q. Yes. A. *See if you can find that.*

Q. And you said she would pass perhaps a little more. A. *I do not think so.*" (Ap. 162-3).

* * * * *

"Q. When you came out of the lavatory you said she had changed her course somewhat, so as to bear in closer to you?

A. Yes, sir; she must have; she was closer than I expected she would be.

Q. At that time you said that you thought she would pass you one-half a mile to your starboard. Why do you change your testimony?

A. I say I saw her after coming out of the lavatory two points, in that neighborhood; she was well on our starboard bow, and I saw her whole starboard bow. *I have not at any time said she would pass me one-half a mile inside of me.* I do not know really how far. I saw this vessel two points on my starboard bow. I saw the whole starboard side of that ship. Had she proceeded on that course as she was doing at the time I came out of the lavatory there would have been no collision.

Q. How do you reconcile your statement that she would not have passed half a mile to your starboard with the statement of your chief officer who has testified she would have passed three-quarters of a mile?

A. I do not know about any testimony he gave.

Mr. DENMAN. Objected to on the ground it calls for the conclusion of the witness.

A. (Contg.) She must have hauled out; she must have changed her course from the first time I saw her.

Q. Do you mean the 'Beaver'? A. Yes, sir.

Mr. CAMPBELL. Q. And borne in towards you?

A. Yes, sir; she certainly must have, or she could not have gone so close.

Q. How far would you say now after you had made this drawing the 'Beaver' would have passed you?

A. When I first saw her she should have passed us about a mile; when I saw her after coming out of the lavatory she should have passed us a good safe distance.

Q. What is that? A. A good safe distance.

Q. What is that?

A. Any distance but well clear of each other.

Q. What is your judgment of the distance she would have passed your starboard when you came out of the toilet? A. I cannot say.

Q. What is your judgment?

A. A good safe distance.

Q. What do you call a good safe distance?

A. Where there is room for two bad steering vessels to pass each other.

Q. Was your vessel of that type?

A. My vessel steers well.

Q. *What was the distance in feet that you would say she would have passed you?*

A. *I cannot answer that.*

Q. *You cannot or you don't want to?*

A. *I refuse to answer that.*

Mr. DENMAN. I don't think there is any need for that suggestion. Go on and answer it.

A. *No, sir, I am not going to answer such questions as that.*

Q. Why not? A. What is the sense of it?

Q. He has a right to have his question answered.

A. That is all right. If I put it in half miles or feet I would have to say something—I would have to go down and figure it.

Q. The reason you do not want to answer it is you have not figured it?

A. I have not the material at hand to.

Mr. CAMPBELL. Q. Until you laid it down on the chart here and was checked up by your own counsel, *you still had in mind she would have passed you half a mile?* A. *I never said that.*

Q. Up to the time you took hold of the chart you still had in mind she would pass you one-half a mile to your starboard?

A. *I never said she would pass one-half a mile abeam of me.*

Mr. DENMAN. I think the witness has a right to go back and see.

The WITNESS. I do not care about that. It has nothing to do with me. I am telling the truth.

Mr. DENMAN. That is all going into the record.

Mr. CAMPBELL. Mr. Reporter, will you turn back to that part of the witness' testimony and read it? (Thereupon the Reporter reads the testimony.)" (Ap. 164-7).

"Further Redirect Examination.

Mr. DENMAN. Q. At Mr. Campbell's request there was read to you your testimony given to him in regard to the position of the two vessels as you saw them when you came out of the lavatory, and from that testimony it appears that *you stated that you thought from the position of the vessel as you saw her when you first looked out after leaving the lavatory that she would pass you half a mile on your starboard side?*

A. *I did make that statement.*

Q. I will ask you whether or not that is correct.

A. When I came out of the lavatory if she continued on her course, *she should have passed me roughly half a mile.*

Q. How could she do that two points on your starboard bow?

Mr. CAMPBELL. Objected to as being cross-examination of his own witness.

A. When I came out of the lavatory, *that is just a rough guess*; judging her appearance when I came out of the lavatory she was going full speed at the time; she might have passed in that neighborhood, it might be less, and it might be

more; at any rate she had plenty of room to pass if she continued on her course; that is my statement from beginning to end.

Q. And you say your impression as to half a mile cannot be true as an exact figure?

Mr. CAMPEELL. Objected to as not proper re-direct examination; it is cross-examination and a leading question.

A. As to what exact figure?

Mr. DENMAN. Q. As to half a mile being the distance——

A. (Intg.) By direct bearing from my vessel?

Q. Bearing two points as you looked at her and saw her two points on your starboard bow.

A. I said two points or more on my starboard bow; somewhere in that neighborhood. When I came out of the lavatory the vessel should have passed well clear of us had she continued on her course. That is the shortest way to put it. When I first saw the vessel she was five or six miles off, somewhere in that neighborhood. Then, bringing it up again when I first saw her, it confused me. When I first saw the vessel she was five or six miles off, which I stated here at different times, and then you again bring it up when I first saw her. All you want is the truth, isn't it?

Q. Yes. When you first saw her, in your judgment she was going to pass you a mile off?

A. Yes, sir. *She should have passed us a mile off.* She was bearing a point on our bow, and should have passed one mile off. When I next saw the vessel if she had gone on about her business she would have passed us well clear. I would not say how many feet. I might go back over the course and take my tape measure and measure it off." (Ap. 168-9).

If the testimony of the master and mate of the "Necanicum" is to be given credence, and that of the officers of the "Beaver" rejected, then this court will

accept a version of the collision whereby it is said that the "Beaver", a large passenger steamer, proceeding southbound along the coast of California in the day time, on a course which she had traversed for years, suddenly and in defiance of a passing whistle to the contrary from the "Necanicum", altered her course from a point, $1/2$ to $3/4$ of a mile ahead and from $1/2$ to $3/4$ of a mile to starboard of the "Necanicum", across the course of the latter. No reason of any kind could exist for such a change of course.

It would have been an act of wildest insanity, for a child would have instantly known that it would render collision imminent. Had such a maneuver been charged to the "Beaver" if she had approached *slightly* to starboard, then there might have been some ground for saying that, perhaps, the testimony of those on the "Necanicum" was true, but when it is stated that she made the change in violation of positive rules of navigation when she was on a parallel course, which, if adhered to, would have carried her from $1/2$ to $3/4$ of a mile to starboard of the "Necanicum", it is impossible to give any credence to the testimony in the face of proof of a more rational course of navigation. The question as to whether this version of the collision is to be accepted as true is one that this court must decide. It is of greatest importance because, if the testimony is not accepted, it goes to the very vitals of the "Necanicum's" case.

This is not the first time that the courts, and particularly this court, have been asked to accept similar charges of change in course as the cause of collision.

In the early case of

Haney v. Baltimore Steam Packet Co., 23 How.
287, 291,

the Supreme Court characterized such an excuse as stereotyped and usually resorted to for the purpose of justifying a careless collision, *always improbable and generally false*.

This court, in

The Dauntless, 129 Fed. 715,

refused to accept a less exaggerated version of a collision, referring with approval to *Haney v. Baltimore*, *etc.*, in the following language:

“In *Haney v. Baltimore Steam Packet Co.*, 23 How. 287, 291, 16 L. ed. 562, which was a case in admiralty, where the question raised was very similar to the case in hand, the answer admitted the collision, and the result of it, and it also admitted that the schooner was seen at a distance of 2 or 3 miles; that the steamer was proceeding at a rate of 14 miles an hour, heading due north, and the schooner holding her course nearly due south; but it alleged as an excuse that, while the steamboat and schooner were meeting on parallel lines, the schooner suddenly changed her course and ran under the bows of the steamer. The court said: ‘*This is the stereotyped excuse usually resorted to for the purpose of justifying a careless collision. It is always improbable and generally false.*’” (p. 721.) (Italics ours.)

The rule is one of reason. Apply it to this case, and will any one deny that it is improbable that the “Beaver” so radically altered her course? Certainly not. Why *would* her master do it? What purpose could it serve? He had the miles of water to port.

No reason, except criminal carelessness amounting to insanity, could explain it.

Yet, if the "*Necanicum*" approached the "*Beaver*", as the officers of the latter state, and starboarded her helm, just as the mate ordered, and as the master admitted was done, the collision would have been brought about as stated by the witnesses for the "*Beaver*". That the "*Necanicum*'s" helm was starboarded is admitted. The moment it was altered, it of necessity began to swing the "*Necanicum*" in the direction stated by those on the "*Beaver*". Those on the "*Necanicum*", of course, deny that she changed her course to port as much as claimed by the "*Beaver*", but it is more reasonable to believe that those on the "*Necanicum*" erred in this recollection of the distance the "*Necanicum*" swung under her starboard helm, than it is that the "*Beaver*" ever made such an insane alteration of course. Common sense and the rule of reason supports the "*Beaver*'s" version.

If the court will but read the deposition of Theodore J. Hewitt, a lawyer of standing and of high character, residing in Portland, who was a passenger upon the "*Beaver*", we feel assured that it will find it impossible to say that the "*Beaver*" ever made the alteration of course attributed to her. He detected her change to starboard, and says that immediately she began to reverse, for he was over the stern of the vessel and could feel the vibration of her engines. It is certain that if the "*Beaver*" had been at the place and distance attributed to her ($1/2$ to $3/4$ of a mile ahead and to starboard) she would never have been

struck by the "Necanicum" at the admitted angle of impact, if she was reversed at the time with respect to the signals and collision stated by Mr. Hewitt, and the officers of the "Beaver".

Thus, the complete variance in the testimony of those on the "Necanicum" as to the whistles sounded by the "Beaver" points to lack of veracity. The "Beaver" had a large deep whistle (Ap. 289). Captain Seike, a witness for the "Necanicum", so testified (Ap. 770). She certainly was blowing fog signals upon it for some time prior to the collision as Mr. Hewitt stated (Ap. 187), yet no one on the "Necanicum" would admit hearing it (Ap. 48, 49). The mate emphatically denied that he *ever* heard the one blast, which he "surmised" (Ap. 69) was given as a cross signal to his alleged two whistles. Instead of sound, he says that he distinctly saw the steam emitting (Ap. 68-9, 74, 78).

"Q. You say you could see the steam, but *you could not hear the whistle?*

A. *No, sir.*

Q. What was the steam you saw, from her whistle?

A. Apparently from her whistle.

Q. Was her whistle in plain view?

A. The smokestack was visible and the whistle must have been there.

Q. *The steam you saw coming from the whistle?*

A. *Yes, sir."* (Ap. 68-9).

* * * * *

"Q. Did you watch the steam to see it?

A. *I watched the steam; no sound emitted."*
(Ap. 78).

The lookout, said to have been on the forecastle, claims to have heard no whistle from the "Beaver" (Ap. 579-580) and a sailor working in life boat back of the bridge claimed that he even saw water coming from the whistle (Ap. 596-7, 601, 605-6), an impossibility because of the whistle's construction (Ap. 436).

On the other hand, a sailor on deck between the bridge and forecastle testified that he heard the "Beaver's" one whistle (Ap. 97, 99), and the master on approaching the bridge, farthest away from the "Beaver", stated that he heard her whistle distinctly.

"Q. You say you heard an answer to your two whistles, you heard one whistle from the 'Beaver'?"

A. I did.

Q. Distinctly?"

* * * * *

"A. I heard the blast of the whistle.

Q. You had no difficulty in hearing it?"

A. None whatever." (Ap. 139).

The undisciplined condition of affairs aboard the "Necanicum" is further shown by the card game in session in the forecastle. From the testimony of the seaman, Gannan, one of the players (Ap. 108-110, 116), and the chief engineer, Slater, a looker-on, the game continued without concern as to what peril might be threatening the "Necanicum" until the collision happened and all were thrown to the deck. The chief engineer, whose admitted post of duty in an emergency was in the engine-room, claims to have known from her fog whistle that the "Necanicum" was proceeding in a fog. He admitted that he heard her two blast passing whistle and paid no attention to it, and says

that thereafter he felt the engines reverse and heard three whistles given on the "Necanicum's" whistle. *And yet he never moved from the card game until the vessels were together* (Ap. 647-650). Even after the vessels were in collision, if we were to believe the seaman, Gannan, he gathered himself together off the deck, and without leaving the forecastle to ascertain the name of the other colliding vessel, went below to see whether or not the "Necanicum" was leaking (Ap. 114).

Here were five men on the decks of the "Necanicum": *the two best stationed to hear any whistles given by the "Beaver", one the navigating officer who blew the "Necanicum's" alleged whistles, the other the lookout whose duty it was to hear and report approaching whistles, did not hear any whistle from the "Beaver", but saw steam, and the seaman in the life boat who "saw water"; the other two, not on watch, and less advantageously placed, heard the one whistle distinctly.* What shall be said of the accuracy of such testimony? It is hardly of a character to stamp those witnesses as sufficiently credible to justify the court in accepting their version of the collision in face of the principle enunciated in

The Dauntless, supra.

Rather it bespeaks a chaotic condition aboard the "Necanicum", which will amply justify this court in refusing to find that the "Beaver" was swinging across the course of the "Necanicum" as contended.

Considering the high improbability of such a maneuver as is charged by those on the "Necanicum" to the "Beaver", the inexplainable discrepancies in the testimony of the "Necanicum's" witnesses as to the whistles heard and not heard from the "Beaver", the undisciplined condition disclosed by the card game and its absorbing influence over its participants, the admitted starboarding of the "Necanicum's" helm, the mutilation of the "Necanicum's" bridge log affecting the matter of her speed in the fog at the time of collision, and the disinterested testimony of Mr. Hewitt, we submit that the record will not justify this court in disregarding the rule of probabilities which it recognized and applied in

The Dauntless, supra.

The probabilities of the causes of the collision and the weight of the evidence, necessitates, we respectfully submit, the court holding that the collision was caused under the circumstances testified to by the officers and crew of the "Beaver", and that the "Necanicum" was in fault in altering her course to port instead of to starboard.

The "Necanicum" failed to stop in time to prevent the collision.

The weight of the evidence shows that the "Necanicum" had not stopped prior to the moment of impact between the two vessels.

Here again, however, upon this question we have the same discrepancies between the master and the mate of the "Necanicum". The latter, the officer who could

not hear any whistle from the "Beaver" although he was looking at the whistle and saw the steam, whereas the master farther away distinctly heard the sound, glibly testified that the "Necanicum" was going astern at a speed of three or four miles. Note his statement:

"Q. Had you succeeded in reducing your speed between the time that the order full speed astern was given and the collision?

A. Yes, sir; rapidly astern, *the vessel was going rapidly astern.* (Ap. 35).

* * * * *

Q. *How long* had your vessel gained sternway before they actually came together?

A. Authentically I could not state, but I judge she gained sternway *three-quarters to one mile.*

Q. *How fast* was she going sternway at the time of the collision, astern??

A. *Three or four miles probably.*

Q. *Astern?*

A. *Yes, sir.*" (Ap. 80).

The master, on the other hand, testified as follows:

"Q What is your judgment about it, as to whether or not she was going three or four knots an hour astern?

A. At that particular time I would say she was going astern—I could not give you the speed astern; she was going astern.

Q. She did not have any appreciable sternway that you could see?

A. She had.

Q. She had appreciable sternway?

A. *Yes, sir, we had no means of knowing she was going astern.*

Q. What was the speed astern at the time of the collision?

A. *That I cannot say.*

Q. Is it because you cannot, or you do not want to?

A. *I would not say.*" (Ap. 145).

Under such evidence, is there any certainty that the "Necanicum" had sternway? The master, on the bridge, says that they had no means of knowing that she was going astern; the mate testifies that her speed astern was three or four miles, nearly one-half her normal full speed. It seems unnecessary to point out that such testimony is worthless, but the merest guess work (to be charitable), and comes from keenly interested witnesses not given, as their evidence throughout shows, to impartiality toward the "Necanicum". Had the master any positive knowledge of her having gained sternway, his own self interest would have quickened him to assert it with unmistakable clearness.

Those on the "Beaver" declare with equal asseveration that the "Necanicum" had headway, striking the "Beaver" at an angle of about 45 degrees (Ap. 296).

But we are not required, nor do we, to rely upon the evidence adduced from those having personal interest, as every officer and sailor does, in the outcome of litigation. The court is fortunate in having the frank and comprehensive testimony of a man of good character and standing, a keen observer of high intelligence, who saw the two vessels when they were a considerable distance apart before the collision and closely watched their movements until after the actual impact. We, therefore, commend the court to a careful consideration of the deposition of Mr. Hewitt, appearing on pages 184 to 202 of the Apostles, together with the drawing showing the relative positions of approach of the two vessels, attached to the deposition as an exhibit.

From Mr. Hewitt's testimony it appears that he was sitting on the upper deck of the "Beaver" at the extreme stern watching the ship's carpenter repairing some seats; that they ran into fog, quite a heavy bank, and just before they entered it, the "Beaver" began to blow fog signals. After a little while, there was one long blast blown, and the carpenter raised up and looked across the ship towards the port side. Mr. Hewitt thereupon turned to the port side to watch the ship go by, for he knew that it was a whistle to pass to port. As he kind of swung around, the "Beaver" gave three short, sharp blasts, and the ship began to tremble all over. He sensed that something was wrong; the carpenter dropped his tools and ran directly across the ship to the port side. Mr. Hewitt followed suit and ran down along the port side until he came to the life boats, and from there he saw the "Necanicum" "sitting" almost at right angles ahead, quite a little bit ahead. He estimated the distance at 200 yards. He stood there looking at them and didn't think of a collision until they kept drifting closer and closer, and as he stood there he said to himself aloud: "They are going to strike, sure as the devil." And he stood there, and "*then they came right on and crashed together*". The impact produced a loud crashing noise, and listed the "Beaver" quite a good deal to the right, and his little boy came running back to him, frightened and crying.

As near as he could judge then, they (the "Necanicum") were headed a little towards the "Beaver",

and the latter's bow "scemed to be turning to the right continually". He said:

"Q. And your boat kept drifting?

A. *Our boat had practically come to a stand-still, and theirs came right on.*" (Ap. 199).

He heard no whistles from the "Necanicum" until after the collision (Ap. 184-202).

Mr. Hewitt's testimony not only corroborates that of the officers and crew of the "Beaver" as to the positions and maneuvers of the two vessels leading to the collision, but it establishes beyond all question that the "Necanicum" had headway to the moment of impact, for without headway the collision could never have occurred. Mr. Hewitt's description was a most human one by a man of observation, and no possible reason exists for this court refusing to give it full credence. Certain it is, then, that when he saw the "Necanicum", she was off the port bow of the "Beaver" when the "Beaver" was swinging to starboard. *Now, with the stem of the "Beaver" pointing to starboard of the stem of the "Necanicum", and with the "Beaver" continuing to turn to starboard, the two vessels could never have come together at a point 12 feet abaft the "Beaver's" stem without the "Necanicum" having headway to the moment of impact.* Take the drawing made by Mr. Hewitt, roughly illustrating the positions of the two vessels with respect to each other when he first saw them! (Ap. 195-6). With the vessels in those respective positions, and with the "Beaver" continuing ahead and swinging to starboard, *it would be a physical impossibility for the collision to happen without the*

“Necanicum” having headway to the moment of collision.

This evidence, then, establishes to a demonstration that the “Necanicum” did not stop before the collision. *Tested by whatever rule of law you will, it equally condemns her in fault with the “Beaver” for the collision.* Having breached a statutory rule of navigation, the “Necanicum” has not, and cannot, sustain the burden of proving that the collision could not by any possibility have been caused by the speed at which she was proceeding in the fog. On the contrary, her speed was a direct contributory cause, for she did not stop in time to prevent the collision.

Further corroboration of the fact that the “Necanicum” was under headway at the time of collision is found in the nature of the damage inflicted upon both vessels, and in the effect of the collision blow upon those on the “Necanicum”.

According to the “Necanicum’s” version of the collision, the “Beaver” cut across her bow from a position at least half a mile to starboard and half a mile ahead. If this were true, then the blow which the “Necanicum” would have received would have been a glancing one, and not a direct blow. But the blow was a direct one, for it cracked the “Necanicum’s” rudder post; it moved her port oil tank *forward* three inches and started her starboard one (Ap. 215). Both were filled at San Pedro (Ap. 624). It threw the assistant engineer *forward* about five feet (Ap. 623), and knocked a sailor almost the full length of a life boat in which he was working, shot him along the top of the seats on his

stomach like (Ap. 591, 609). The lookout was thrown off the forecastle head (Ap. 573). Those effects upon the "Necanicum" convincingly indicated that the blow to her took a fore and aft direction. If it had been but a glancing blow from the "Beaver" crossing the bow of the "Necanicum", it doubtless would have turned the "Necanicum" just as she was turned by the "Beaver's" headway, but the forward momentum to the objects and persons on the "Necanicum" would not have been present. Manifestly, that required headway on the "Necanicum", as did the crush to her stem (Ap. 531). (See the testimony of Capt. Pillsbury and Messrs. Dickie and Evers, Ap. 209, 479, 520).

Had the "Necanicum" been moving sternward, the turning effect of the glancing blow would have been still less.

The blow of the collision was severe enough to list the "Beaver" to starboard, as so clearly appears from the deposition of Mr. Hewitt (Ap. 189). This, together with the character and extent of the damage inflicted upon the "Beaver", showed conclusively that the "Necanicum" had material headway. It will serve no purpose to detail the damage, but if the court will give consideration to the testimony of Captain Pillsbury and Messrs. Dickie and Evers, in conjunction with the photographs offered in evidence showing the damage, conviction, we submit, will quickly follow that the damage to the "Beaver" could only have resulted from a direct blow from the "Necanicum". The turning of the "Beaver's"

forefoot and the twisting of her stem could only have followed from a direct lateral thrust. It could never have been caused by a glancing blow upon the "Necanicum", dead in the water, and less so under sternway. (See the testimony of Captain Pillsbury and Messrs. Dickie and Evers, Ap. 209, 479, 520.)

The experts called for the "Necanicum" recognized this, for out of their fertile imaginations evolved the ridiculous theory of the "Beaver" "impaling" herself upon the retreating stem of the "Necanicum". (See the testimony of Mr. Hough and Captain Rinder, Ap. 678, 729).

The conclusion is unavoidable from all of the evidence adduced and from this array of facts and circumstances that the "Necanicum" had material headway when she struck the "Beaver". She most certainly was neither stopped nor under sternway, for had she been, the collision not only would never have happened, but the character of resulting damage could never have been inflicted upon either vessel by any such collision as the witnesses for the "Necanicum" would have this court believe occurred.

We respectfully submit, therefore, that the "Necanicum" was in fault in that she altered her course to port instead of to starboard as the exchanged passing signals required, and did not stop in time to prevent the collision.

IV.

THE "BEAVER" WAS NOT IN FAULT FOR THE COLLISION IN THAT SHE WAS NOT PROCEEDING AT AN IMMODERATE SPEED IF THE COURT SHOULD FIND THAT A FOG DID NOT PREVAIL.

If the court should be of the opinion that a fog sufficient to bring into application rule 16 did not prevail, for the officers and crew of the "Beaver" stated that they were able to see the "Necanicum" at a distance ahead of about a mile (Ap. 293), then, we submit, the "Beaver" was in no respect responsible for the collision.

Under those conditions, a port to port passing of the vessels under exchanged whistles of a single blast such as were given, was proper. In those circumstances, there was nothing improper in the "Beaver's" speed, for her normal full speed was sixteen knots (Ap. 305-6). Save for the error of excessive speed in the fog, the collision was caused by the negligent starboarding of the "Necanicum".

We respectfully submit that the District Court erred as assigned, and that, if this court should find that fog prevailed, the decree of the District Court in cause No. 2969 herein should be reversed and said cause remanded with instructions to enter a decree in favor of appellant; that, if this court should find that fog did not prevail, the decrees of the District Court in causes Nos. 2969 and 2970 herein should be reversed and said causes remanded with instructions to enter a

decree in favor of appellant in cause No. 2969 and to dismiss the libel in cause No. 2970.

And that appellant may recover its costs herein incurred, and have such other and further relief as shall be deemed meet and equitable.

Dated, San Francisco,

May 19, 1917.

Respectfully submitted,

EDWARD J. McCUTCHEN,

IRA A. CAMPBELL,

McCUTCHEN, OLNEY & WILLARD,

Proctors for Appellant.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY
(a corporation), owner of the American Steam-
ship "Beaver",

Appellant.

VS.

LEGGETT STEAMSHIP COMPANY (a corporation),
claimant of the Steam Schooner "Necanicum",
her engines, boilers, boats, tackle, apparel and
furniture,

Appellee.

No. 2969

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY
(a corporation),

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Appellee.

No. 2970

REPLY BRIEF FOR APPELLANT.

EDWARD J. McCUTCHEN,

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Appellee.

No. 2970

REPLY BRIEF FOR APPELLANT.

This appeal is a trial de novo.

It is contended that this court should not give consideration to the questions raised by this appeal because of alleged findings by the lower court in the decree. This case, we submit, is not one for the application of such a drastic rule, for several reasons.

In the first place, the rule is not enforced in those cases where the trial court has not had the advantages of *seeing and hearing all of the witnesses*.

Hamburg-Amerikanische etc. v. Gye, 207 Fed. 247;

Lazarus v. Barber et al., 136 Fed. 534;

The Santa Rita, 176 Fed. 890;

1 C. J. 1351.

It enjoyed no such privilege in the present instance so far as the navigation of the “*Necanicum*” was concerned, for the most important witnesses—in fact all of the “*Necanicum’s*” officers, who controlled her navigation—were not examined in open court, but on depositions. This included Captain Keegan, Mate Beckwith and Seamen Olsen and Gannan. *This condition of the record was not called to the court’s attention by appellee in its effort to invoke the rule by which it hopes to shut out an inquiry into the “Necanicum’s” navigation.* If such a rule should be applied to a case where all of the most material testimony of *one vessel* is taken on deposition, and not in open court, then it should be enforced when the same situation exists with respect to both vessels, and thus the right of review, in this court, of questions of fact in admiralty cases would be enforced. Yet it is settled law that a hearing on appeal in an admiralty cause is a trial *de novo*.

The Louisville, 154 U. S. 657; 14 S. Ct. 1190; 25 L. Ed. 771;

1 C. J. 1350.

Being a trial *de novo*, this court has repeatedly, and will, review a lower court’s findings where material

evidence was given on depositions by witnesses not before the court. Had Captain Keegan's and Mate Beckwith's demeanor, while on examination, been under observation by the court, we would not have had the opinion rendered by the court below, which passed over in silence everything pertaining to the "Necanicum's" navigation.

In the second place, it is a rule of practice in admiralty causes that the written opinion of the lower court takes the place of findings ordinarily made in an action at law. So in this case, the only findings of fact which properly can be said to be those of the lower court are those embodied in its opinion. And this court will note that *not a word therein contained refers to the navigation of the "Necanicum."* Its silence upon the impossible theory of the "Beaver's" change of course, as detailed by Captain Keegan and Mate Beckwith, is ominous. The decree upon which appellee grounds its entire contention was not prepared by the lower court, but by proctors for appellee, and was presented to the court *ex parte*, without notice to appellant. As to whether the contents thereof, and the fact that they did not conform to the court's opinion, were called to the court's attention, appellant is unadvised, for it had no opportunity to be present. Certain it is, however, that the decree is not in conformity with or entered upon the findings set forth in the opinion. As most certainly there was not communication between the court and appellee's proctors as to the court's views regarding the merits of the case, save as such views were expressed in the opin-

ion, or in open court when proctors for both parties were present, it is manifest that when proctors for appellee prepared the decree entirely out of conformity to the opinion, it was not embodying therein any statement of fact as to the "Necanicum's" navigation of which it could have been advised that the court desired to make a finding. The viciousness of a practice which permitted the preparation and *ex parte* presentation to a trial court of decrees based upon opinions, without notice to the other side, and an opportunity to be heard, has been recognized by the District Court and this court, for in September, 1916, new rules effective November 1, 1916, were adopted which expressly require the serving of proposed decrees upon the opposing party. Why? Obviously, so that there can be no mistake about their conforming to the findings and conclusions of the court as set forth in its opinion.

It is clear that, notwithstanding the silence of the lower court's opinion upon the navigation of the "Necanicum", appellee was endeavoring to foreclose this court from considering the cause *de novo* on appeal, by invoking the rule now asserted. Yet, as we have pointed out, the effort was futile because the rule can have no application, under settled practice, to a case where all of the material testimony on which the findings are based was not taken in open court so that the trial court had an opportunity to observe the witnesses upon the stand. The findings as to which appellee claims an estoppel fall within this category, because they involve a consideration of the testimony

of Captain Keegan, Mate Beckwith and Seamen Olsen and Gannan, none of whom were produced in open court.

Furthermore, the facts as to the speed of the "Necanicum" are undisputed, so that the provisions of the decree in respect thereto, while designated "findings", are but conclusions of law, for the question was and is whether such speed was within the law.

We submit, therefore, that *the effort of appellee to induce this court not to examine into the navigation of the "Necanicum" should fail.* The very fact that it would like to have the court seal the book as to the testimony of her officers and crew bespeaks anything but a confidence in the lawfulness of the navigation of the "Necanicum." If there was no question as to her navigation, a trial *de novo* should have been welcomed, instead of an attempt made to invoke a rule which could have no application for reasons undisclosed by appellee to this court in asking for an enforcement of the rule.

The moderate speed rule requires a slackening under full speed. The "Necanicum" was in violation of the rule.

Appellee devoted a considerable portion of its brief to an argument that the cases cited by appellant laying down the rule that moderate speed as prescribed by the collision rules requires a reduction of speed under full speed are obsolete, and not good law. Yet, in connection therewith, two facts are worthy of note by this court, namely, that the decisions in those cases were principally rendered by the ablest and most experi-

enced American admiralty judge of recent times, District Judge Brown of the Southern District of New York, and that *not one decision in all of the American courts has been cited overruling them*, or even commenting adversely upon the rule therein enunciated. And in all of the cases of collision, which have arisen in the courts of (to the present time) the greatest maritime nation, but *one* has been found which even reflects upon the rule. In this state of the record, we are confident that this court will stand by the decisions of the American tribunals, and will not erroneously follow an unsupported English case. If the rule is no longer binding, then surely some American decision would have been rendered discrediting it.

Nor do the reasons advanced by appellee show that the rule has become obsolete, for the differences between the statutory rule embodied in Rev. St. Sec. 4233 and Art. 13 of the Rules of 1885, and Art. 16 of the present rules, constitutes no reason for holding that the rule has become obsolete. By Art. 13, *every ship*, instead of *every steam vessel*, was required to go at a moderate speed, not only in *fog* as previously provided, but also in *mist* or *falling snow*. And by Art. 16, the conditions under which a vessel should proceed at moderate speed, were extended to include *heavy rain-storms*. But under all of the rules, the obligation of a steam vessel to proceed in a fog at moderate speed remained unaffected. This being true, the decisions which appellee would now, after all the years during which they have remained without adverse comment or overruling, have this court hold were obsolete, remain unquestioned authority.

That the rule has not become obsolete, but is operative today, finds definite recognition in the recent case of

The Robert M. Thompson, 244 Fed. 662,

wherein the Circuit Court of Appeals for the Second Circuit said:

“The schooner is going as fast as it is possible for her to go. The International Rules of Navigation provide, article 16, as follows:

‘Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at moderate speed, having careful regard for the existing circumstances and conditions.’

It is, of course, difficult to define moderate speed in all circumstances but it is safe, we think, to define it as something less than top speed or full speed. *A vessel that is proceeding as fast as her machinery or her sails will carry her is not going at moderate speed.*” (Italics ours.)

The strenuousness of appellee’s effort to have the rule repudiated by this court shows a consciousness that if it is to be enforced, the “Necanicum” must be held in fault, for there is no dispute about the fact, as shown by her log and the testimony of her officers, that she was proceeding at $8\frac{1}{4}$ knots, *her greatest speed* (see appellant’s opening brief, pp. 5-15, for resumé of the evidence).

In fairness to the lower court, we may say that the “Necanicum’s” violation of the rule in this regard was not called to the court’s attention. As the fact of the “Necanicum’s” speed was admitted, the question as to whether she was in violation of the collision rules is one purely of law. If the rule is enforced, the “Necanicum” must be held in fault.

We recognize, of course, that the rule, like all other rules, must be enforced with reason. As with other rules, extreme cases can be stated, as appellee has attempted to do, as though it proved that the rule had become obsolete. There can be no question but that the rule was laid down and enforced in the cases cited by appellant (brief pp. 15-21), but the reasons which appellee advances against the application of the rule at the present, would, if sound, have equally argued against it at the time Judge Brown rendered the decisions. The fact is that the grounds asserted for now denying the rule are without substance.

As we have said, the rule is to be applied with reason, and the statements of Judge Brown in the course of his opinions, in

The State of Alabama, 17 Fed. 847,

and

The Pennland, 23 Fed. 551,

would seem to be the proper criteria for the application of the rule. He said in the former:

“Although the fog was not dense, it was nevertheless evidently such a fog as *materially to interfere with the timely observation of other vessels*, and therefore increased materially the dangers of navigation. To go at full speed in such a fog is not a compliance with Rule 21, which requires steamers in a fog to go at moderate speed. * * * No steamer’s speed is moderate *in the sense of Rule 21*, so long as she is going at her *ordinary full speed*.” (Italics ours.)

And in

The Pennland, he stated:

“Assuming that there was a sufficiently dense haze or fog, as her witnesses assert, to require the

sounding of the fog whistle at the time when the first whistle was given,—viz., the third blast before the collision,—it was her duty to go at moderate speed under Rule 21; that is, reduced speed.” (Italics ours.)

That is to say, *if the fog is such as to require the blowing of fog whistles, and as materially to interfere with the timely observation of other vessels, the rule is to be applied*, and will be violated if a vessel is going at her ordinary full speed. It is in this sense that the rule is to be enforced. And so applied, it is a rule as applicable today as when District Judge Brown enunciated it in his several cases cited. Nor, we submit, as thus applied in reason, is the rule essentially in conflict with the *one* English case upon which appellee relies in support of the theory of obsolescence.

Applied to the “*Necanicum*”, the rule absolutely condemns her, and the District Court would undoubtedly have so held had the rule been specifically called to its attention. The District Court found that a fog was prevailing, a condition evidenced by the fact that both vessels were blowing their fog whistles.

The Pennland, supra.

And it is apparent from the District Court’s condemnation that it considered the fog to be of sufficient density to require a reduction in speed of the “*Beaver*.” Mistake arose somewhere, evidently because the vessels did not have a clear vision of each other. In other words, the fog that prevailed and induced the masters of both vessels *to blow fog signals* was such, within the criterion of Judge Brown, *as materially to inter-*

ferre with the timely observation of the other vessel, and to necessitate a reduction of speed within the rule in

The Pennland, supra.

One has but to read the statements of Captain Keegan and Mate Beckwith of the "insane" maneuvering attributed to the "Beaver" to become convinced, to be charitable, that the fog materially interfered with their timely observation of her. If not, then there would never have been the "mix up" in steering orders on the bridge of the "Necanicum" (appellant's brief, p. 29). It is a reasonable assumption that if Captain Keegan and Mate Beckwith ever saw so material, radical and insane a change of course as they claim for the "Beaver", and fog was not materially interfering with their observation, more timely danger signals would have been given and greater efforts to avoid the collision would have been made. The fact is that the circumstances establish a condition of fog such as to create a situation for the application of the moderate speed rule as interpreted and enforced by the courts in the cases cited by appellant. That rule was not complied with, but was violated by the "Necanicum" in running at full speed.

We respectfully submit that the "Necanicum" was in fault and that this court should so find. There is no sufficient reason to exempt her from the enforcement of the rule which applies alike to all vessels. It condemned the "Beaver" and unless special dispensation is to be meted out to the "Necanicum", it neces-

sitates her also being held in fault. And in reason so, because it follows that the large power which will drive a vessel like the "Beaver" through the water at high speed will also correspondingly check her quickly on reversing, whereas a lower power, like the "Necanicum's", will be as slow to stop her headway on reversing as it was to drive her at highest speed when under full headway. Running at full speed, the "Necanicum" had no reserve power to use in quickly stopping.

The Normandie, 43 Fed. 151, at 157.

If the fog was sufficiently dense to have necessitated the reduction of the "Beaver's" speed to place her in compliance with the rule, then, in justice there is no reason why the proceeding of the "Necanicum" at full speed should not condemn her.

The "Necanicum's" speed was excessive.

But even aside from the foregoing rule which should be enforced as against the "Necanicum", her speed was excessive even if adjudged by the rule which appellee would have the court apply, for the fact is that she was not brought to a standstill until before the impact. This is established by the uncontradicted testimony of the only independent witness called, that of Mr. Hewitt. It is true that he was a landsman, inexperienced at sea, but that fact should give greater weight to his testimony, for it is untarnished with the self-satisfied opinions of "sea lawyers" so commonly met with in collision cases. Appellee's personal attack upon Mr. Hewitt proves nothing more than a realiza-

tion by appellee that if credence is given to Mr. Hewitt's statements of what he saw, the condemnation of the "Necanicum" must follow as certain as the sun rises on the morrow, for it would have been a physical impossibility for collision to have occurred without the "Necanicum's" having maintained substantial headway up to the moment of impact. *No witness testified that, if the vessels were in the relative positions that Mr. Hewitt saw them to be, the collision could have occurred without the "Necanicum's" maintaining her headway to the impact, although appellee utilized the services of the experts who evolved the "impaling theory."*

Were Mr. Hewitt not a lawyer of standing and credence at the bar of Portland, that fact could easily have been established by the eminent Portland counsel who cross-examined him, but no, the court is asked to dismiss his testimony as unworthy of belief, because four lawyers, whom appellee consulted, did not enjoy a personal acquaintance with Mr. Hewitt. That could be said of most any lawyer in these days of intensified business in the large cities. But it proves nothing as to Mr. Hewitt. And so the fact stands substantially unchallenged that the steamers approached as he says. If so, then not only did the "Necanicum" maintain her headway until the collision, but the "Beaver" could never have cut the course that the "Necanicum's" witnesses attributed to her.

Appellee comments upon the fact that other disinterested witnesses than Mr. Hewitt were not called. Why should they? Mr. Hewitt's statements are not

contradicted by any other independent witness. And if, as we have said, credence was not to be given his statement, that fact could have been readily proved by the Portland counsel in the case. On the contrary, however, the straightforward and unaffected way in which he detailed his observations substantiated their truth.

The court will note with pertinent interest that *not a case is cited by appellee holding that a vessel going at a speed of 8 knots in a fog is not excessive, whatever the density of the fog*, although vessels have been condemned, time after time, for proceeding at a lesser speed (appellant's brief, pp. 22-28).

We respectfully submit that if this court holds, as it must if it does not reverse the lower court, that the "Beaver" should be condemned for proceeding in a fog at a rate under its normal full speed, but that the "Necanicum" should be excused notwithstanding that she was going at a full speed of $8\frac{1}{4}$ knots in the same fog, it will render a decision that will be without precedent in all the American admiralty courts.

The alleged course of the "Beaver".

The drawing which "proctor," *not by a witness*, has drawn to "demonstrate" how the collision occurred *illustrates the absurdity of the course which the officers of the "Necanicum" would have the court believe the "Beaver" steered.*

Can this court imagine anything more insane than to think that the "Beaver", laden with passengers and proceeding at a speed of 14 knots, on a straight, clear

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her engines, boilers, boats, tackle, apparel and
furniture,

Appellee.

SAN FRANCISCO & PORTLAND STEAMSHIP COMPANY
(a corporation),

Appellant,

vs.

No. 2970

LEGGETT STEAMSHIP COMPANY (a corporation),

Appellee.

BRIEF FOR APPELLEE.

W. S. BURNETT,

THOMAS A. THACHER,

DENMAN AND ARNOLD,

Proctors for Appellee.

Filed

JUN 7 - 1917

F. D. Monckton,
Clerk.

Filed this.....day of June, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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No. 2970

BRIEF FOR APPELLEE.

Introduction.

FINDINGS OF THE LOWER COURT.

In the consideration of the case at bar, it will unquestionably aid this court to have before it the

opinion rendered by Judge Dooling, and the decree entered by him. The opinion reads as follows:

“These are cross-actions growing out of a collision between the ‘Beaver’ and the ‘Necanicum’ which occurred October 30th, 1913. The ‘Beaver’ is a passenger steamer of 2,997 net tonnage, and having a length of 380 feet and 57 feet beam. The ‘Necanicum’ is a steam schooner, 175 feet in length and with a beam of 35 or 40 feet. The ‘Beaver’, loaded, was coming down, and the ‘Necanicum’, light, going up the coast, on approximately parallel courses. The former was proceeding at the rate of 14.7 knots and the latter at the rate of $8\frac{1}{4}$ knots per hour. The atmosphere was foggy, the fog occasionally rising and settling, and being denser at some times than at others. According to the testimony of those on the ‘Necanicum’, the ‘Beaver’ was first sighted when about five miles distant, at which time she was a point or two on the starboard bow. The fog then settled and hid her from view until about two minutes before the collision. She was then still on the starboard bow, distant about a half a mile. The ‘Necanicum’ blew two whistles, denoting the intention to pass starboard to starboard. Instead of doing this the ‘Beaver’ turned across the ‘Necanicum’s’ bow and the collision resulted. According to those on the ‘Beaver’, the ‘Necanicum’ was sighted when about a mile distant, dead ahead, or a little on the port bow. The ‘Beaver’ then gave a signal of one whistle which was not answered, and in about thirty seconds gave another similar signal, which was answered by one whistle from the ‘Necanicum’, consummating an agreement that the vessels should pass port to port, but the ‘Necanicum’, instead of turning to starboard, turned to port, thus bringing them together. Both claim to have been regularly blowing fog-signals, but each denies that the fog-signals of the other were heard. There is in this case, as in all similar cases coming under

my observation, much contradictory testimony as to the events occurring at the time of the collision. But this one fact seems to me to stand out clearly; that the 'Beaver' was gravely negligent in proceeding at the rate of 14.7 knots per hour in the fog, and that *but for such speed, and the resulting momentum due to her size and weight, the collision would not have occurred.** Contradictory as the testimony is, there is nothing therein which tends in any manner to excuse the running of a large, heavy and loaded passenger steamer at such a rate of speed in the fog then prevailing. This speed prevented the rectification, before it was too late, of whatever error arose from confused or contradictory signals.

A decree will therefore be entered fixing the responsibility for the collision upon the 'Beaver', and dismissing the libel of her owners. The other cause will be referred to the commissioner to ascertain and report the damage which the 'Necanicum' sustained.

December 10th, 1915.

M. T. DOOLING,
Judge."

The following is a copy of the body of the decree, dismissing the libel against the SS. "Necanicum":

"This cause having been heard on the pleadings and proofs, and having been argued and submitted by the advocates of the respective parties, and due deliberation having been had, the Court now finds:

That the evidence fails to establish that the said steamship 'Necanicum', prior to and at the time of the collision alleged in the libel, did not have a proper and efficient lookout and proper and competent officers, or that she failed to alter her course or conduct herself in accordance with the passing

*Italics ours.

rules or exchange of signals between her and the steamship 'Beaver', or that she failed to stop and reverse at a proper time before said collision; and further finds

That the said collision was not in any way caused or contributed to by any neglect, error, default or misconduct of the steamship 'Necanicum', or her claimant, the Leggett Steamship Company; and further finds

That the said collision was caused by the neglect and misconduct of the steamship 'Beaver' in proceeding in the fog, prior to the collision, at an immoderate rate of speed, while the steamship '*Necanicum*' was proceeding at a moderate rate of speed for the conditions then prevailing;*

It is therefore ordered, adjudged and decreed, that libelant take nothing by its libel herein, and that the said libel be dismissed, and the libelant is liable to the claimant, Leggett Steamship Company, for its costs to be taxed.

Dated, December 13th, 1915.

M. T. DOOLING,
Judge."†

In the above opinion and decree, the court set out fully its findings relative to the case, in which testimony covering seven hundred and seventy-one printed pages was taken, twenty-eight witnesses were examined, and a number of trial days consumed. The decree supplements the opinion, and between them practically all material points raised in the case are covered.

*Italics ours.

†A substantially similar decree was entered in the case of Leggett Steamship Co., a corporation, Libelant v. San Francisco & Portland Steamship Co., a corporation, Respondent, No. 2970. Under this decree the Leggett Steamship Company was awarded \$2372.81. In the libel in the case of San Francisco & Portland SS. Co. v. Leggett SS. Co., it was claimed by appellant in its libel that the "Beaver" was damaged in the sum of \$45,000.

I.

THE "NECANICUM", PREVIOUS TO THE COLLISION, DID NOT PROCEED IN A FOG AT AN IMMODERATE SPEED, AND CANNOT BE HELD AT FAULT THEREFOR.

Bearing in mind the findings of the court, we shall now take up the appellant's argument. The principal theory advanced is that if a fog was prevailing, then the SS. "Necanicum" as well as the SS. "Beaver" was at fault and, as a consequence, the damage should be divided. The fault of the "Beaver" is admitted by appellant in no uncertain terms:

"If fog were prevailing then confessedly the 'Beaver' was at fault for proceeding at approximately full speed, for she was thereby in breach of Article 16 of the International Rules for the prevention of collisions" (Appellant's Brief, 5).

The suggestion, that there was any question as to whether or not there was fog, is obviously without merit. Both the libels and the answers in the cases at bar set forth that a fog prevailed (Record, 8-20). Since all the witnesses present at the collision agreed as to this fact, appellant can hardly claim now that there was no fog. At the outset, therefore, it is admitted that the SS. "Beaver" was in fault at the time of the collision.

That part of Article 16, referred to, reads as follows:

"Every vessel shall, in a fog, mist, falling snow, or heavy rainstorm, go at a moderate speed, having careful regard for the existing circumstances and conditions."

This is the same article which appellant claims the "Necanicum" to have violated. Such a claim is an absolute contradiction to the holding of the lower court, when it found:

"That the said collision was caused by the neglect and misconduct of the steamship 'Beaver' in proceeding in the fog, prior to the collision, at an immoderate rate of speed, *while the steamship 'Necanicum' was proceeding at a moderate rate of speed for the conditions then prevailing*" (see p. 4, *supra*).

Appellant alleges that the speed at which the "Necanicum" was proceeding when the vessels came in sight of each other was not moderate under Article 16. The basis of this contention seems to be, not that the "Necanicum" was proceeding at too rapid a speed, but that as a matter of law, as the "Necanicum" was proceeding at substantially her full speed, it could not be said that such speed was moderate within the meaning of Article 16. Our opponent apparently finds itself in a situation where it could not claim, with any likelihood of success, that under "the existing circumstances and conditions" the speed was in itself excessive, since the findings of the trial court, having before it the fullest testimony as to such circumstances and conditions, would undoubtedly be upheld in the appellate court. Hence appellant has developed a theory of Article 16 which can be applied regardless of conditions. To sustain itself in such a theory, appellant cites a number of somewhat antiquated decisions, alleged to show that however slow a vessel may go in fog or mist or snow, and however light the

fog or mist or snow may be, the vessel must go still slower. While for obvious reasons such a theory appeals to appellant, it cannot be said to be in harmony with the law, since the decisions cited in appellant's brief arose not under Article 16 but under a totally different rule.

A study of the cases cited by appellant, together with the decisions of the United States Supreme Court dealing with Article 16 is convincing in showing that there is no such hard and fixed rule, but that:

“ ‘Moderate speed’ is purely a relative term, which means no more than that the vessel must run at a prudent rate of speed. Time, place and circumstance, rather than the swiftness of the vessel over her course, determine whether the actual speed was immoderate, in that it was imprudent.”

Quinette v. Bisso, 136 Fed. 825 at 830 (C. C. A. 5th).

The Supreme Court of the United States has commented, without approval, on the fact that certain courts have suggested hard and fast rules regarding speed in fogs. Thus in *The Colorado*, 91 U. S. 692, 702, 23 L. Ed. 379-382, (a dense fog case, where the steamer held solely liable was moving ten miles and collided with a bark making four miles an hour), the Supreme Court said:

“Different formulas have been suggested by different judges as criterions for determining whether the speed of a steamer in any given case was or was not greater than was consistent with the duty which the steamer owed to other vessels navigating the same water, but, perhaps, none yet

suggested is more useful or better suited to enable the inquirer to reach a correct conclusion, than the one adopted by the Privy Council. The Bata-
vian, 40 Eng. L. & E. 25.

“In that case the court say: ‘At whatever rate she (the steamer) was going, if going at such a rate as made it dangerous to any craft which she ought to have seen, and might have seen, she had no right to go at that rate.’”

The same court in *The Chattahoochee*, 173 U. S. 540, 548, 43 L. Ed. 801, 805, declared:

“It has been said by this court, in respect to steamers, that they are bound to reduce their speed to such a rate as will enable them to stop in time to avoid a collision after an approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law.”

The law was laid down with finality by the Supreme Court in *The Umbria*, 166 U. S. 404, 417, 41 L. Ed. 1053, 1061, as follows:

“The general consensus of opinion in this country is to the effect that a steamer is bound to use *only** such precautions as will enable her to stop in time to avoid a collision, after the approaching vessel comes in sight, provided such approaching vessel is herself going at the moderate speed required by law.”

Ignoring the decisions of the Supreme Court and the decisions in the Circuit Courts of Appeal for the last three decades, appellant seeks to justify its claim that moderate speed means “reduced speed” by certain early cases decided by the United States District Courts between 1883 and 1887.⁴ These cases, decided long

*Italics ours.

*Italics ours.
472. City of New York, 12 Feb 634; The Star of Alabama 17 Feb
847; New York 18 Feb 636, 20 Feb 638, The Pennsylvania 23 Feb 651;
The City of Baltimore 26 Feb 656. The other cases cited by ap-

before *The Umbria* and *The Chattahoochee*, supra, concerned a rule which was entirely different from the present Article 16, which appellant claims the SS. "Necanicum" violated. An examination of the history of the International Rules will make this clear.*

The first set of International Rules was adopted in 1863, by a British Order in Council, and in 1864 by an Act of Congress. The twenty-first of these rules, as they appear in the Revised Statutes, Section 4233, requires that "every steam vessel shall, when in a fog, go at a moderate speed".

In 1879 a new code was enacted in Great Britain, and in 1885 the same code was adopted in the United States. The twenty-first rule, above referred to, was superseded in this later code by Article 13, which provides that "every *ship* shall, in a fog, *mist or falling snow*, go at a moderate speed"† (23 U. S. Stat. at L. 438).

The set of International Rules with which we are now concerned, however, was adopted still later. Of this last code the United States Supreme Court, in the recent case of *The Beaver* (*Lie v. San Francisco & Portland SS. Co.*, U. S. Adv. Ops., 1916, pp. 270, 271, decided March 6, 1917, affirming the judgment of this court) said:

"In the year 1889 representatives of over thirty of the maritime nations of the world met in convention at Washington for the purpose of dis-

*These rules are set forth in extenso in Spencer on Marine Collisions § 24.

†The italics indicate the changes in the rule.

cussing the international code of rules to prevent collisions at sea, and of suggesting such changes and modifications as experience had shown to be necessary. The recommendations of this convention were adopted by Act of Congress of August 19, 1890 (26 Stat. at L. 320, chap. 802), became effective by proclamation of the President (28 Stat. at L. 1250) on the 1st day of July, 1897, and have been operative ever since.

Of these rules the following is applicable to the case we are considering:

‘Art. 16. Every vessel shall, in a fog, mist, falling snow, or *heavy rainstorm*, go at a moderate speed, *having careful regard to the existing circumstances and conditions*.

‘A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.’

The most cursory reader of this rule must see that while the first paragraph of it gives to the navigator, discretion as to what shall be ‘moderate speed’ in a fog, the command of the second paragraph is imperative that he shall stop his engines when the conditions described confront him.”*

Comparing the rule as it has existed during this period, it will be noted that the atmospheric conditions which call for a moderate rate of speed, have been enlarged not only to embrace conditions of fog but also those of mist, falling snow and heavy rainstorms, and also that the words “having careful regard to the existing circumstances and conditions” have been added.

*The italics in Article 16, as quoted above are our own, and show the further changes in the rule as compared with the rule as it was adopted in 1885.

The only cases cited by appellant which it could be argued might sustain the rule for which he contends, viz., that there is no such thing as "moderate speed" unless it be also "reduced speed", are cases which arose prior to the adoption of Article 13, *supra*, by Act of Congress in 1885. At the time of the adoption of Article 13 in 1885, that rule had already been construed as to this very point in the Court of Appeals in England, in *The Elysia*, 4 Asp. N. S. 540; 46 L. T. 840.

The claim had been made that a certain slow sailing ship was at fault in a collision in a fog because she was going at her full speed. The court held such a claim untenable. Lord Coleridge said:

"There are constructions of this 13th Rule which have been suggested for our consideration, but I think the rule means what it says. It says that a ship, whether a sailing vessel or a steamship, must go at a speed which is perfectly moderate. It says nothing whatever about the capacity of a vessel for speed. If a ship be a slow ship, it does not follow that, because she is going at her greatest speed, which is a slow speed, she is to reduce her speed in proportion to a faster vessel. It is not, if her best speed is moderate, that she must reduce it; but if her speed is more than moderate, she must bring it down to what is moderate. It would, indeed, be very dangerous to lay down any rule as to what is moderate and what is immoderate speed. A moderate speed in the Atlantic Ocean may be immoderate elsewhere. Under the circumstances of this case then, I am of the same opinion as the court below and the Elder Brethren; and I am corroborated in that opinion by the gentlemen who assist us, that the sailing vessel *Emily*, going at the rate of five knots an hour, was not going at an immoderate speed when the collision with the *Elysia* took place." (543.)

Lord Cotton said, on the same point:

"Now, as to the consideration of the 13th rule, I have little to add to what has already been said by my learned brothers. In my opinion the rule does not require that the speed is to be slackened by a naturally slow vessel. If the vessel was going at a moderate speed, it is not bound to go at a less speed. But what is a moderate speed? One cannot exactly define what is a moderate speed. That must depend, not upon the speed of the vessel herself, but upon the position in which she is, whether in a crowded channel or on the open seas, where vessels are not very frequently met, and in my opinion it is not necessary to decide that point in the present case. It might depend upon whether a vessel is rapid in answering her helm or not, but the moderation of the speed must depend upon the circumstances, not upon what is the speed of a vessel naturally, but where she is sailing when there is a fog on." (544)*

*It is interesting to note that an examination of the English decisions to date shows that the principle announced in the case of "*The Elysia*", supra, has been uniformly followed.

The primary question is always the density of the fog, and then all the other elements are considered which bear on the ability of the steamer to bring herself to a stop before reaching what otherwise would be the point of impact, assuming that the opposing vessel is also proceeding moderately as thus defined.

Thus in

"*The Counsellor*", (1913), page 70, Barge Deane, J., in dealing with a collision between two steamships occurring in a fog in the Bay of Biscay, gave the following as the formula to determine what is a moderate rate of speed in a fog under the existing International Rule:

"I think a very fair rule to make is this, and it is one which has been suggested to me by one of the Elder Brethren: You ought not to go so fast in a fog that you cannot pull up within the distance that you can see. If you cannot see more than 400 feet you ought to be going at such a speed that you can pull up. If you are going in a fog at such a speed that you cannot pull up in time if anything requires you to pull up, you are going too fast."

The whole subject is exhaustively considered in the case of

"*The Campania*", (1901) p. 289; 9 Asp. Mar. Cas. 177, where the English Court of Appeal affirmed the decision of the Admiralty Judge and the opinion of each is reported.

The case last mentioned repudiates, in another form, the arbitrary doctrine urged by the appellant in the case at bar, namely: that a

Since this construction of Article 13 had been made prior to the adoption of that article by Congress, it is to be "presumed that Congress, in adopting the language of the English Act, had in mind the construction given to these words by the English courts and intended to incorporate them into the statute".

Interstate Commerce Comm. v. B. & O. R. R.,
145 U. S. 263 at 284.

When, in 1889, the maritime conference above referred to was held at Washington, to revise the then existing International Code, the convention, in order to eliminate any possible doubt, specifically made the term "moderate speed" dependent upon existing circumstances and conditions. This was done by adding to the former rule the words "having careful regard to the existing circumstances and conditions". It is to be noted that the tendency of the changes of what is now the first paragraph of Article 16 has been to insert additional atmospheric conditions, in which moderate speed shall be observed and at the same time to make the moderate

moderate speed cannot exist as such under the rule, unless it also be a reduced speed. The court held that, even were it a fact (which it did not concede) that "The Campania" could not with safety to herself and passengers travel at a less speed in a dense fog than nine knots an hour, nevertheless, that this did not exonerate "The Campania" if she was, within the meaning of the principle which is succinctly set forth in "The Counsellor", *supra*, in fact proceeding at an immoderate rate of speed, which concededly "The Campania" was doing.

In a word, the steamer, as the rule says, must go at a moderate rate of speed. If her full speed is under the circumstances existing, in fact a moderate rate of speed, it is none the less a moderate rate of speed because it is also her full speed. On the other hand, if her slowest rate of speed is in fact greater than a moderate rate of speed, under the circumstances existing, it is none the less an immoderate rate of speed, because it also is her slowest rate of speed. As a practical matter, in the contingency last mentioned, the steamer must either stop until the fog clears, or make headway slowly by stopping the engines at brief intervals of time.

speed to be exercised by the ship dependent upon "existing circumstances and conditions". As our Supreme Court has so recently pointed out, this "gives to the navigator discretion as to what shall be moderate speed in a fog" (*The Beaver*, supra).

On the other hand, we find appellant harking back to an arbitrary rule which never gained currency in the decisions of our courts, and which, as we have pointed out, is contrary to the construction placed by the British courts upon the rule at the time of its adoption in this country in 1885 and is in direct contradiction to the later phraseology of the rule as it has existed for more than a quarter of a century.

Entirely aside from the fact that no court has ever construed Article 16 as appellant has suggested, the weakness of the argument made on behalf of the "Beaver" is apparent from the slightest consideration of the contention made. To sustain itself appellant is urging this court to hold that in all fogs, all mists and whenever snow is falling, whether one can see a mile or ten feet, the speed of all vessels, however slow or small, must be reduced. If this court makes this holding, then in a mist, when visibility extends over a mile and a quarter, a gasoline boat going three miles an hour must cut down her speed, or be held in fault if she is run down by a transpacific liner. It is only natural that appellant, recognizing that its large heavy steamer was plunging through the light fog prior to the collision at the rate of 14.7 knots an hour, should attempt to unload a part of its liability upon the slow unladen "Necanicum"; but granting, as is

apparent, that appellant's case is far from strong, we are surprised that it should attempt to persuade this court to declare that at all times, in all fogs and all mists, however light, all ships, whether they go two or three or twenty-five or thirty knots an hour, must reduce their speed, or be held all equally negligent. The absurdity of such a claim is apparent from its mere statement.*

To strengthen this claim that in all fogs even the slowest ships should go slower, appellant quotes from a number of cases in which vessels traveling through fogs at certain speeds have been held at fault. Of course the degree of speed proper in a fog depends upon the thickness of the fog. There are fogs so dense that one cannot see twenty feet, and fogs so light that one can see for a mile. The fog prior to the "Beaver-Necanicum" collision was of a light variety, since admittedly the vessels when seen by each other were somewhere between half a mile and a mile apart (Record 54, 95, 297, 451, 575, 595).

As the court below found in its opinion "the atmosphere was foggy, the fog occasionally rising and settling and being denser at some times than at others" (supra pp. 2-3).

For appellant to cite cases where the fog was thick to prove that the speed of the "Necanicum" was not

*The extract from Spencer on Marine Collisions (1895) and that from the Amer. & Eng. Ency. quoted by appellant, are merely general statements as to the meaning of the term "moderate" as used in the cases mentioned by appellant and already commented upon. The Am. & Eng. Ency. is careful to state "What is moderate speed must always depend upon the circumstances of each case" (Vol. 25, p. 983). Spencer also declares, at page 130, "The moderate rate of speed required by the rules must depend upon the circumstances of the case".

moderate, is futile. Such cases are manifestly not in point. An examination of the opinions mentioned by the appellant makes this clear.

Case.	Speed.	Condition of Fog.
<i>The Oceania Vance</i> , 233 Fed. 77.	6½ to 7 knots.	"Thick fog." Vessels saw each other within 300 feet (217 Fed. 974).
<i>The Belgian King</i> , 125 Fed. 809.		Fog "dense".
<i>The Michigan</i> , 63 Fed. 280.	5 to 6 "	"Low lying fog": vessels saw each other 400 feet off (283).
<i>The Harold</i> , 84 Fed. 698.	6 "	"Fog was so thick that lights could not be seen for more than a few hundred feet."
<i>In re Clyde SS. Co.</i> , 134 Fed. 95.	6 "	Fog "dense".
<i>The Furnessia</i> , 137 Fed. 955 (Aff. 154 Fed. 348).	6 "	"Fog so thick that a light could not be seen until less than ship's length away" (351).
<i>The Tremont</i> , 160 Fed. 1016.	6 miles.	"The fog was so dense that an approaching vessel could not be seen at a greater distance than 100 to 150 feet" (1018).
<i>The Delaware</i> , 213 Fed. 214.	6¼ knots.	"Thick fog."
<i>The Martello</i> , 153 U. S. 64.		Fog at entrance to New York Harbor.
<i>McCabe v. Old Dominion SS. Co.</i> , 31 Fed. 234.	7 miles.	Fog "so dense that objects could not be seen through it according to some of the respondent's

Case.	Speed.	Condition of Fog.
		witnesses further than 300 feet, while others estimate the greatest distance at not more than 50 feet”.
<i>The Wyanoke</i> , 40 Fed. 702.	7 knots.	Dense fog, “when the lights were first seen the vessels were about half a ship length away” (703).
<i>The Catalonia</i> , 43 Fed. 396.	7 knots.	“Fog so thick that a ship’s hull and sails could not be seen more than a ship’s length away” (397).
<i>The Pennsylvania</i> , 19 Wall. 125.	7 “	“Dense fog”. “The two vessels were not more than three or four hundred feet apart” when vessels discovered each other.
<i>The City of Panama</i> , Fed. Cases 2764.	8 miles.	“A very dense fog prevailed. The schooner was not discovered until about half a minute before the collision.
<i>The Westphalia</i> , Fed. Cases 17,460.	3-9 “	Fog so thick “vesels 150 to 160 feet” apart when seen.
<i>The Leland</i> , 19 Fed. 771.	8 knots	“Weather very thick and foggy.” “Neither of the crews of these two vessels was aware of the proximity of the other until they were about 300 feet apart” (772).
<i>The State of Alabama</i> , 17 Fed. 847.	8-8½ “	First seen 100 yards apart.

The above cases are cited by appellant as the basis for its statement that "the weight of authority thus condemns the speed of the 'Necanicum'" (Appellant's Brief 27). That they are no authority for such a claim is evident. They are practically all cases where the fog was so dense that the objects could be seen only a few hundred feet away. We do not and could not, without incurring well deserved ridicule, deny that a speed of 8 knots in a dense fog is immoderate, but the fog prevailing in the "Beaver-Necanicum" collision was clearly so light that it could just be called "fog" within the meaning of the term under Article 16. Because of the lightness of the fog, it is difficult to find cases in which the speed of vessels under similar circumstances has been considered. Certain cases in which the speeds have been held moderate are, however:

<i>The Allianca</i> , 39 Fed. 476	7 knots.	Snowstorm; ship's lights seen $\frac{1}{3}$ to $\frac{1}{2}$ mile.
<i>The Lepanto</i> , 21 Fed. 651.	4 $\frac{1}{2}$ "	" "Dense fog."
<i>The Lorenzo D. Baker</i> , 24 Fed. 814.	4-5 miles.	"The fog was so dense that a vessel could not be seen for more than 100 yards off."
<i>The John Pridgeon</i> , 38 Fed. 261.	4 "	" "Densely foggy."

The Supreme Court has said, regarding "moderate speed":

"While it is possible that a speed of six miles an hour, even in a dense fog, may not be excessive upon the open ocean and off the frequented paths of commerce, a different rule applies to a steamer

just emerging from the harbor of the largest port on the Atlantic Coast, and in a neighborhood where she is likely to meet vessels approaching the harbor from at least a dozen points of the compass.”

The Martello, 153 U. S. 64, 70; 38 L. Ed. 637, 640.

If five miles an hour is a moderate speed in a dense fog where one can see only a hundred yards, certainly eight to nine miles an hour is not immoderate when one could see 1000 yards. While the above cases are none of them concerned with so light and fitful a fog as that in which the “Beaver” and “Necanicum” collided, all of them are authority for the holding that in such a fog vessels may run at a fair rate of speed. As stated *supra*, in the cases dealing with Article 16, the meaning of the term “moderate speed” depends on the circumstances in each case, i. e., the exact degree of fog, the sea and weather, the course of the vessels, their ability to stop, etc. In a word, as the Circuit Court of Appeals for the Second Circuit—the appellate tribunal for the court deciding the very cases on which appellant relies*—said:

“Every case, however, depends upon its own circumstances, there is no precise rate that can be held moderate speed under all circumstances.”

The Bayonne, 213 Fed. 216 at 217.

On all these matters the lower court necessarily passed in its holding that

“The ‘Necanicum’ was proceeding at a moderate rate of speed for the conditions then pre-

*The City of New York, 15 Fed. 624; The State of Alabama, 17 Fed. 847; Clare v. Providence & SS. Co., 20 Fed. 535; The Pennland, 23 Fed. 551; The City of Atlanta, 26 Fed. 456; The Britannic, 39 Fed. 395.

vailing" and that as to the "Beaver" "but for such speed and the resulting momentum due to her size and weight, the collision would not have occurred".

Were this court to hold, however, that the speed of the "Necanicum" was not moderate when she was sighted by the "Beaver" half a mile away, still the "Beaver" must be held solely responsible for the collision because the speed of the "Necanicum" cannot be held to have been a proximate cause of the collision. If Article 16 had in fact been broken by appellee, this fact would not make the "Necanicum" liable for the collision. In this connection, see *The Clara*, 55 Fed. 1021, decided by the Circuit Court of Appeals for the Second Circuit, where an attempt was made to hold the "Clara" partially responsible for the collision. The upper court held the other vessel solely at fault and said:

"The more difficult question in the case is whether the Clara is also to be deemed in fault for the collision. The only fault which can be imputed to her is navigating too near the New York shore, in disregard of the state statute which required her to be navigated as near as possible in the center of the river. But she is not to be condemned if her fault was a remote one, and not a proximate cause of the disaster; and the real question as regards her liability is whether her fault was not one of that description. Although she was improperly beyond midriver, she was not so near the shore as to embarrass the Reliance in rounding the Hook if the latter had been properly navigated." (Page 1023.)

To the same effect was *The Titan*, 44 Fed. 510; *The Britannia*, 34 Fed. 546; *La Bretagne*, 179 Fed. 286.

As already stated, the lower court specifically finds

“that the said collision was not in any way caused or contributed to by any neglect, error, default or misconduct of the SS. ‘Necanicum’, or her claimant, the Leggett Steamship Company”.

Here certainly is a square holding by the *nisi prius* court that the SS. “Necanicum”, although she was going at over 7½ knots an hour, did not by any error, default or misconduct contribute to the collision.

“The well settled rule is applicable that the findings of fact of the trial court will not be disturbed in this court unless it clearly appears that there was error. *Whitney v. Olsen*, 108 Fed. 292; *Perriam v. Pacific Coast Co.*, 133 Fed. 140; *The Bailey Gatzert*, 179 Fed. 44.”

The Dolbadam Castle, 222 Fed. 838, 840 (C. C. A. 9th).

It also falls under

“the well settled rule which has been followed by this and other courts, that in cases on appeal in admiralty, when questions of fact are dependent upon conflicting testimony, the decision of the District Judge, who had the opportunity to see the witnesses and judge of their appearance, manner and credibility, will not be reversed, unless it clearly appears to be against the weight of the evidence”.

The Hardy, 229 Fed. 985 at 986-987 (C. C. A. 9th Cir.).

We must therefore examine the record in order to determine whether or not there is substantial evidence to sustain the finding that no fault of the “Necanicum” contributed to the collision. The fault claimed

is the speed of the "Necanicum" when seen half a mile away by the "Beaver". As pointed out, even if the speed of the "Necanicum" was immoderate and hence Article 16 was broken, that breach must be held a contributing cause to the collision before the vessel can be held liable.

To show that there is substantial evidence to sustain the court in its holding that the speed of the "Necanicum" did not contribute to the collision, we need refer to only one part of the evidence. The testimony is that the "Necanicum" could stop herself in $1\frac{1}{2}$ minutes, and that $2\frac{1}{2}$ minutes elapsed between the time when the vessels sighted each other and the collision (*infra* p. 33).

The testimony of the witnesses from the "Necanicum" is, moreover, that this vessel was making considerable sternway at the time of the collision (*infra* p. 33). In other words, there is most substantial evidence to support the holding of the lower court that no alleged fault, no speed of the "Necanicum" contributed to the collision with the SS. "Beaver" on October 30, 1913.

II.

THE COLLISION WAS CAUSED BY THE GROSS ERRORS OF THE SS. "BEAVER" WHICH, APPROACHING ON THE STARBOARD SIDE OF THE "NECANICUM" AT A HIGH RATE OF SPEED IN FOG, CROSS-SIGNALLED THE "NECANICUM" AND CROSSED HER BOW.

(a) Comment on Appellant's Brief.

In the second division of its brief, appellant attempts to have the "Necanicum" held liable because of her

alleged course. The courses of the "Beaver" and the "Necanicum" and the distance the two vessels were apart when each was seen by the other, is sought to be proved by certain employees of the SS. "Beaver". These employees, testifying with a harmony in small details which hardly suggests candor, each relate how, when he looked up and saw the "Necanicum" she was either right ahead or a little on the port bow (Mason 293, Ettershank 357, Bryning 449), and about a mile away (Mason 297, Ettershank 358, Bryning 449).

Appellant characterizes (Appellant's Brief, p. 4) Mr. Hewitt as a member in high standing of the Portland, Oregon, bar. Appellant felicitates this court on its good fortune in

"having the frank and comprehensive testimony of a man of good character and standing, a keen observer, of high intelligence" (p. 55),

and again (p. 57),

"Mr. Hewitt's description was a most human one by a man of observation, and no possible reason exists for this court refusing to give it full credence."

We will concede that Mr. Hewitt's description is a most human one—"To err is human".

There is nothing in the record which throws any light on the eminence of the gentleman at the Portland bar. As a number of members of that bar from whom we have enquired—to be precise, four of its most representative members—do not know the gentleman even by reputation, we cannot aid this court in throwing light on the exact height of his eminence. The

really pertinent matter in reference to him is that admittedly he was undergoing his first ocean experience (Record 196).

At the time the vessels approached each other, Mr. Hewitt was sitting in a position where the lifeboats and the forward part of the ship completely concealed his view (Record 193). Finally he walked to the port side of the "Beaver" and saw the "Necanicum" (194), then about two hundred yards away (Record 197). At this distance, Mr. Hewitt testified of his view of the "Necanicum":

"Yes, it was fairly dense, but not one of those blinding fogs. I could see all parts of our vessel, and I could see the other boat there quite plainly, but I couldn't distinguish anything on it; it looked like a large, dark hull sitting out there, you know" (Record 192).

In other words, a thick fog—which testimony is completely at variance with all the pleadings and with the evidence given by every other witness present at the collision. This testimony, in direct contradiction to that given by all other persons present, shows how little Mr. Hewitt, with his complete lack of experience in matters pertaining to the ocean, remembered of the incident. If experience is of any value, Mr. Hewitt's testimony as to his ability to tell the speed of the vessel by how it felt to him (Record 198), etc., is worth but little.

The remarkable fact is that Mr. Hewitt was the only disinterested witness whom appellant saw fit to produce from a large passenger steamer,—and he could

see nothing of the course of the "Necanicum" until she was within two hundred yards (Record 196). It seems very unlikely that, a little after lunch, on a smooth sea, when the fog was very light, there were not a number of passengers on the deck of a large steamer such as the "Beaver". Yet no one except Mr. Hewitt who, from his position, could not see the course of the "Necanicum", was introduced. Surely the captain and the mate of the "Beaver" were sufficiently versed in collision actions to have secured, immediately after the collision, the names of the passengers who saw the "Necanicum" approach. The "Beaver", at the very time of the collision was in the United States courts because in 1910, while running at full speed in the fog, she sank the Norwegian steamer "Selja" (see *The Beaver*, 197 Fed. 866; 219 Fed. 134). Is not the inference obvious that the reason for not securing the evidence of impartial passengers—not employees—as to the position and course of the "Necanicum", must have been that such testimony would have been unfavorable to the "Beaver"?*

Appellant, at considerable length attacks the testimony of Mate Beckwith and Captain Keegan of the "Necanicum". The testimony of the men from the "Necanicum"—from which not a few culled witnesses, but all the men on deck, were produced—was to the

* As to employees we should like to know why the carpenter who admittedly saw the "Necanicum" before Mr. Hewitt (Hewitt, p. 188) was not called? This was one employee on whom partial responsibility for the collision could not be laid.

effect that the "Beaver" was one, two or three points on the starboard side of the "Necanicum" and about $1\frac{1}{2}$ a mile away when seen prior to the collision (Record 71, 122, 136, 572, 575, 594). That none of these witnesses were sure just how many points off the "Necanicum" the "Beaver" was is clear from the evidence. Appellant attempts to belittle the testimony of Mate Beckwith because, although he pointed out that he thought the bearing of the "Beaver" was about three points to the starboard, he also said he figured she was half or three quarters of a mile to one side (Appellant's Brief 33). From this statement it is argued that the mate's testimony was unworthy of credence because, had the "Beaver" been as far to one side as three quarters of a mile, her swinging over and covering that distance would seem impossible. We are inclined to agree that the "Beaver" was much nearer one point than three points off the starboard of the "Necanicum". The exact number of degrees off starboard probably would not be specifically remembered by a truthful witness—he would remember little more than that the vessel was far enough off his starboard to enable both vessels to pass with ease had their courses been unchanged. Appellant infers that Beckwith was not truthful. An examination of the record shows that Beckwith was not a fool and, if he had wished to lie, he would not have suggested that the "Beaver" was half a mile to the starboard of his vessel. This clearly was the statement of a mistaken but honest man. Simply because his impression, on being asked a question to which he could

only hazard an answer, was erroneous, appellant seeks to discredit his testimony.

By a similar argument, appellant seeks to discredit the testimony of Captain Keegan. This witness figured the "Beaver" was two points off the starboard side of the "Necanicum" (Appellant's Brief 37), and as a "rough guess", that she might have passed the "Necanicum" about half a mile away. When closely questioned, it became evident that the witness' prediction as to what the "Beaver" might have done was the roughest approximation and meant merely that had the "Beaver" continued her course she would have passed the "Necanicum" at a good safe distance (Record 159 to 163).

We will confess that such testimony is of a very different nature from that given on behalf of appellant, of which the following is a sample:

"Q. What was the bearing of the 'Necanicum' at the time you first saw her?

A. Almost ahead, a little bit on the port bow.

Q. How much on the port bow?

A. Oh a couple of degrees."

Ettershank, Record 357.

"Q. What was the bearing of the 'Necanicum' to your vessel at the time you first saw her?

A. Almost ahead, as far as I can recollect; if anything a shade on the port bow.

Q. What do you mean by a shade on the port bow?

A. Well, a degree or two from where I was standing."

Bryning, Record 449.

But, while the testimony of the "Necanicum's" witnesses did not absolutely coincide as to the number of degrees, the "Beaver" was off the "Necanicum", still it is clear that as the "Beaver" and "Necanicum" came in sight of each other, the "Beaver" was well to the starboard of the "Necanicum". If anything is needed to show the veracity of the "Necanicum's" testimony, it is the circumstances regarding the testimony of Peter Christianson, who was at the wheel of the "Necanicum" at the time of the collision. This man was produced as a witness by appellee (Record 663).

It developed on cross-examination that this witness, after having had a quarrel with the master of the "Necanicum" (Record 673), went to the office of the San Francisco & Portland Steamship Company (Record 672), the owner of the SS. "Beaver".

"Mr. CAMPBELL. What was your purpose in going there?

A. As I told you.

Q. To tell the truth about the case? A. Yes."

Record 673.

From the office of the San Francisco & Portland Steamship Company, Christianson was taken by an employee of that company to the office of its attorney (Record 775). This was the day after a debauch and when he had taken already a good many drinks (Record 775, 776). Yet it is perfectly clear from the cross-examination of that man by appellant's counsel, in which the statements made to that attorney at the interview above referred to, were used against the wit-

ness, that this man never suggested that the "Beaver" when sighted before the collision was not off the starboard side of the "Necanicum". If the "Beaver" was in fact not off the starboard of the "Necanicum" when the vessels first sighted each other, then manifestly the witnesses of the "Necanicum" were testifying falsely. And is it not clear that this witness Christianson, who remained a sailor on the "Necanicum" for a year after the collision, when under the influence of liquor and thoroughly angered with the "Necanicum's" captain and owners, would have known of and promptly told the "Beaver's" counsel, had there been any conspiracy among appellee's employees to make a false situation appear the true one?

The log of the SS. "Beaver" fails to corroborate the story of the employees of that steamship, so remarkably uniform as to details. There are a strange number of erasures and substitutions in the log. The original entries are so well erased as to be undecipherable. So hard, however, was the eraser applied that parts of the lines printed on the pages in question were also erased.*

*With the same zeal shown in urging that while the "Beaver" was guilty of speed in a fog, the "Necanicum" was also to blame, appellant urges that "2:20" as the time of collision was "crudely" attempted to be changed to 2:25 by converting the cipher into a 5. Appellant should be more frank with the Court. 2:25 is set beside the words "Collision with stmr. Beaver. Turned back SE $\frac{1}{2}$ E." The time the new course was taken—when the time would naturally be entered—was undoubtedly about 2:25. No one ever suggested that the time of the collision was later than 2:20. Had the log been changed in order to make it appear that the "Necanicum" was going slower than was the fact, is it not likely that at least the person perpetrating the fraud would have testified that 2:25 was the time of the collision? Moreover, would a person attempting such a "fraud" not have erased the word or figure written over? Certainly one would think that where such fraud is perpetrated or even attempted, those on the vessel whose log has been altered would

The balance of appellant's attacks upon appellee's witnesses seem concerned with such matters as the criticism of a card game in the forecastle. It is difficult to understand why men off duty should not play cards. The claim that the card game should have broken up as soon as the three whistles were heard, seems to indicate that on all occasions when a vessel is not going right ahead the crew should, although off duty, race out on deck. So weak a contention clearly is unworthy of comment.

III.

THE FACTS IN THE CASE.

(a) Speed and Reduction of Speed of Vessels. Space in Which to Manoeuvre.

Appellant's brief is primarily a collection of a few extracts from the eight hundred page record, coupled with considerable abuse of the "Necanicum's" wit-

stand by, or at least the person making the alteration would stand by the log, in their testimony, even as to degrees, points, distances, time etc.

As to the effect of an altered log, it is well to note the following extract from *The Tillie*, Fed. Cases 14,048:

"If possible, it ought never to happen that a case sought to be supported by a fabricated log book should succeed; and while charges of this kind are not to be listened to unless based upon strong evidence, if they are supported by testimony and remain unanswered on the evidence, they compel an adverse decree."

See also *The Sicilian Prince*, 128 Fed. 133.

"It is the universal custom of all vessels to keep a log and the statutes of the United States require them to do so. This requirement is not fulfilled by having a book called a log, in which no entries are made or in which the entries which are made are intentionally meagre, vague and perfunctory, or in which leaves probably containing evidence relating to transactions in litigation are removed. The legitimate inference in all such cases is that if the true facts were entered in the log they would be unfavorable to the vessel."

nesses. On account of the sketchy nature of that brief as a whole, we shall review the evidence with some detail.

The "Necanicum" was proceeding at $8\frac{1}{4}$ knots and could stop herself in $1\frac{1}{2}$ minutes (Peterson 753) or (averaging the speed from full to stopping at one-half the full) in 618 feet. Allowing the other vessel an equal speed, it would require 1236 feet to stop the two vessels, or less than a quarter of a nautical mile. Presuming the vessels to be half a mile apart, this would allow over 1700 feet for manoeuvring before the vessels even began to reverse. It is submitted that this is not an immoderate speed for the "Necanicum".

The "Beaver" proceeded at 14.7 knots and could stop herself in 2 minutes and 50 seconds, or 1512 feet (Record 348). That is to say, the combined stopping distance, with an opponent going at an equal rate, was over half a mile, and if the vessels were half a mile apart when sighted, they would have no time at all for any calculations or manoeuvres before they began to reverse. It is submitted that ocean passenger carriers are not allowed to so shave their speed calculations, and that 14.7 knots on this day was excessive speed for the "Beaver".

(b) Estimates As to Distance at Which Vessels Were First Seen in Fog Would Place Them Half a Mile Apart, Too Near for a 14.7 Knot Speed.

Emanuelson, Lookout, "Necanicum"	$\frac{1}{4}$ to $\frac{1}{2}$ mile (575)
Keegan, Captain "Necanicum"	$\frac{1}{2}$ mile or more (136-137)

Prendergast (Man in lifeboat,

“Necanicum”)

$\frac{1}{4}$ to $\frac{1}{2}$ mile (594)

Beckwith, mate

About $\frac{3}{4}$ mile (54)

Oleson, sailor

Less than $\frac{1}{2}$ mile (95)

All three of the “Beaver’s” witnesses, Captain Mason, Mate Ettershank and lookout Bryning, place the distance at a mile, and the “Beaver’s” log has been altered to show one mile but the presumption is that it was a less distance.

The Tillie, Fed. Cases 14,048 (supra);

The Sicilian Prince, 128 Fed. 133.

Besides, Ettershank clearly told a series of untruths regarding the log (Record 369, 370, 371, 372), and hence his testimony is not credible; and Bryning, while giving a glib and accurate account of occurrences up to the collision, was away off as to all matters he had not discussed with the company’s representatives before the trial, that is as to all matters immediately after the collision (Record 456-460). For instance, he says they waited around fifteen minutes before starting, while the engineer’s log shows that the vessel *did not stop at all* after the collision. The log read, “2:16 full ast., 2:18 full ahd., 2:19 ahd. slow, 2:20 ahd. full (Record 422). The “Beaver” would pick up her full speed from a stop in one minute.

That the vessels sighted one another when they were about half a mile apart is also apparent from the time in which they were approaching in sight of one another.

(c) **The Evidence Shows That About 2½ Minutes Elapsed Between the First Sighting of the “Beaver” and the Collision. This Is One Minute Longer Than It Takes the “Necanicum” to Stop, and 40 Seconds Less Than It Takes the “Beaver”.**

The uncontradicted incidents on the “Necanicum” are: (1) “Beaver” sighted (claimed on starboard bow); (2) Helm starboarded; (3) Propeller reversed, helm put hard aport; (4) The collision.

“NECANICUM’S” WITNESSES:

Clemens, Second Officer, says log line pointing forward before collision (397); reversing over 1½ minutes (393, 397);

Clough, engineer on watch, reversing 2 minutes from 2:16 (616);

Prendergast, reversing 1½ to 2 minutes (591);

Slater, chief engineer, about 2 minutes (644);

Christensen, at wheel, 1½ to 2 minutes (664);

Olsen, says she had sternway before the collision, saw water from wheel at one-third ship’s length from stern (99); takes 1½ minutes (Peterson, 753);

Captain Keegan says she had sternway 45 seconds before the collision (153); only 10 seconds between first order to starboard and hard aport (120);

Christensen says the “Necanicum” had turned a point and a half between order to starboard and to port (663);

Prendergast says (30 seconds between starboard and hard aport orders) time from first seeing “Beaver” till collision less than two minutes (603);

Beckwith says between 2 and 3 minutes between time saw "Beaver" and collision (33).

"BEAVER'S" ESTIMATES AS TO TIME:

Townsend, "Beaver's" chief engineer, walked as fast as he could 60 feet on main deck, rose 8 foot stairs and walked 70 feet on hurricane deck between the "Beaver's" three whistles and the collision (428-431). This would take *less than fifty-five seconds* at an ordinarily brisk pace. The three whistles were blown at the same time that the captain telegraphed to reverse. For good measure let us allow a minute.

Before reversing, Ettershank says, the vessel ported for half a minute (358), then hard aport for 15 seconds (376), or about 1 minute and 45 seconds from the first whistle to the collision.

Roffler, the man at the wheel on the "Beaver", says the whole time between the "Beaver's" first whistle and the collision was less than a minute (477), the fog shutting in very thick when Ettershank called Mason, and continued so until the collision (479).

Townsend says there were 2 one blast signals from the "Beaver" 15 seconds apart (423), and three blasts in 15 seconds (426), or one minute and thirty seconds from the first whistle to the collision.

The "Beaver's" log, written up from the mate's notes made after the collision (389), shows four minutes from 2:14 to 2:18 between sighting the "Necanicum" and the collision, but 2:14 appears to have been altered from 2:16.

(d) "Beaver in Fault for Porting Helm and Turning to Her Starboard Towards the "Necanicum".

Each vessel was on the other's starboard bow.

"NECANICUM'S" WITNESSES:

Emanuelson, lookout, "Beaver" 1 to 2 points on starboard bow (572);

Beckwith, mate, "Beaver" about 3 points on starboard bow (54);

Keegan, Captain, "Beaver" 2 points on starboard bow (119);

Prendergast (in lifeboat), "Beaver" 2 points on starboard bow (589);

Clemens, 2nd mate, "Beaver" well on starboard bow (410);

Olsen (working on deck), "Beaver" 3 points on starboard bow (94);

Ottenhauser (came out from forecastle), "Beaver" all of 2 points on starboard (634).

None of these witnesses, save Beckwith and Prendergast could see the "Beaver" dead ahead, as she was light forward and the elevation of the forecastle shut off their view (119).

(e) "Beaver" Must Have Had "Necanicum" on Her Starboard Hand As Collision Came After "Beaver" Had Run for 2½ Minutes, Turning Rapidly to Her Starboard.

We have shown, supra, the "Beaver" not reversing over a minute. Presuming she was under a port helm for ½ minute and hard aport helm for half a

minute, and then hard aport with reversing for a minute, she must have turned in a curving course to her starboard at least six points.

Ettershank, of "Beaver", 4 points in little over minute reversing (385);

Seike, of "Beaver", 4 to $4\frac{1}{2}$ points in 1 minute 20 seconds (768);

Rinder, 4 points in 1 minute 5 seconds (730);

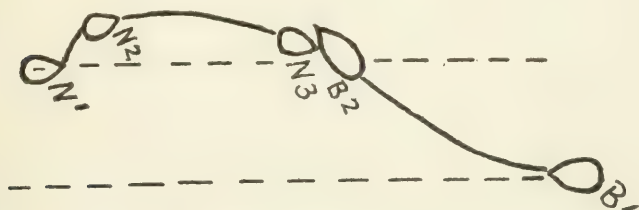
Mason, the "Beaver" would turn clear around in 4 minutes (349);

Mason, she would turn rapidly to starboard under the conditions of that day (332-333).

The "Necanicum", a much slower vessel, at first turned to her port under a starboard helm (663), but this did not continue over 30 seconds and at most she could not have turned over 2 points (667) from her course, that is from $NW\frac{1}{2}W$ to somewhere just below W NW. With the reversing of her right handed propeller, which turned the vessel to her starboard, for about 2 minutes, helped by a hard aport helm, the "Necanicum" turned back much more than she went to her port. In $1\frac{1}{2}$ minutes reversing, with a hard aport helm, she would turn $3\frac{1}{2}$ points (Peterson, 753), and supposing two minutes reversing, it would reach 4 points (Keegan, 174), or bringing her around to N NW. This was about what she pointed at the time of the collision (Keegan, 174).

The scars on the "Beaver" clinch this, as after the "Beaver" had turned at least 6 points, she was

struck at an angle of 40 to 45 degrees. The "Necanicum", to strike her at this angle, must have turned back to her starboard at least 2 points more than she turned to port, while it is uncontradicted that the "Beaver" was turning continuously to her starboard, most of the time with a hard aport helm, until the collision. Since the vessels came together after the "Beaver" had been turning to her starboard for a much longer time, and at a much greater speed than the "Necanicum", it follows that she must have travelled to a much greater distance to her starboard than the "Necanicum" to her port. As they started on practically parallel courses, it also follows that the "Beaver" must have started from a point to the "Necanicum's" starboard.



The turning of the "Beaver" to her starboard was fault, and the "Necanicum's" two whistle signal was proper.

(f) The "Necanicum" Was at Least at a Standstill at the Time of the Collision.

The "Necanicum" had been reversing for about two minutes (supra), and could stop herself in a minute and a half (Record 753). Her log line on the

port side was pointed forward at the moment of impact (Clemens 397). The water from her propeller on the starboard side ran forward a third of the length of the vessel. The listing, if any, of the "Beaver" was due to the "Beaver's" driving her flare on the "Necanicum's" bow just as a ferry boat lists when striking the wharf. Attorney Hewitt was the only person who particularly noticed her list. It is astonishing that all of the other persons on the "Beaver" who were introduced as witnesses should not have been carefully interrogated on this point.

(g) "Beaver" Had Headway of About 8 Knots at the Time of the Collision.

The testimony is that the "Beaver" could not have been reversed more than one minute (*supra*). In one minute she would have lost 7 knots on a 15 knot headway (Dickie 508). This would make her speed at the time of the impact about 8 knots an hour. The force of the blow to the "Necanicum" is shown by the fact that several men were knocked down, the tanks were set forward, the rudder stock was smashed and the 4 x 4 iron tiller was bent (Record 215). The "Beaver" furthermore, at the time of the collision, had foam under her bow.

(h) The "Necanicum" Received Two Thrusts, One a Scraping, Turning Her Hard Aport, and the Other a Drive Back When Her Bow Caught on the Strong Transverse Beams of the "Beaver".

The scratches on the "Beaver's" side show she scraped the "Necanicum" before finally engaging her

(Pillsbury 226). This would turn her head to port and stern to starboard and drive the rudder, which was on a port helm, and hence drawn towards the starboard side (Record 733), back towards amidships. This was followed by the driving of the "Necanicum" directly astern when she came up firmly into the "Beaver" and, as a result of which the rudder was driven back to starboard and the tiller struck the block and bent forward (Record 794).

The effect of the first motion was to pull the wheel out of the hands of the helmsman, who was holding the helm to port and throw him from the starboard to the portside of the wheelhouse. The effect of the second blow was to reverse this and spin the wheel around in the opposite direction (Christianson 665). The bend in the tiller showing the rudder to have been on the starboard side corroborates therefore the appellee's testimony that the helm was ported during the reversing of the "Necanicum".

(i) Attorney Hewitt's Drawing.

This drawing (Lib. Ex. 1, Def. Hewitt) clearly disproves the contention of appellant as to the courses of the ships. There is no question that the "Beaver" was going ahead and to her starboard with considerable speed. (1) The "Necanicum" in order to collide with the "Beaver" would, under this drawing, have to chase her—an impossibility. (2) If the "Necanicum" should have increased her speed so as to catch up with the "Beaver", she would have to turn to her port and the angle of striking the "Beaver" would be

from the "Beaver's" aft forward, instead of from forward aft, at 45° as all the witnesses and the exhibits agree. (3) If the "Necanicum" was reversing and necessarily turning to her starboard with the "Beaver" doing the same thing, the vessels could never come together from the position or the angle shown. During the year after the collision, Mr. Hewitt had confused what he saw at the moment of collision with what preceded it.

(j) "Necanicum's" Lookout Not Negligent.

Emanuelson says the reason why he did not report the "Beaver's" one whistle cross signal to the "Necanicum's" two blasts was because the "Necanicum" at once blew three whistles, showing that the bridge officers knew of it and were reversing to meet the emergency thus created (Record 583). His reporting would have been useless, and his failure to do so has no causative relation to the collision.

(k) No Fault in Captain Keegan Taking Command From Mate Beckwith and Giving Reversing Order With Hard Aport Helm.

Christiansen is reported to have said that Keegan asked him not to say that he had given a hard aport order when he was reversing the "Necanicum". We cannot see any motive for such a request. If the hard aport order had not been given, the "Necanicum" would not have turned so much to her starboard but would have gone further on, and the "Beaver" would

have rammed her and sent her to the bottom, just as she did the "Selja". Porting helped the turning to starboard caused by the "Necanicum's" reversing. It was the only thing to do, and if it had given the "Necanicum" *only ten feet more of a turn to her starboard* would have avoided the damage, as at most it would have been but a glancing blow from contact of the round of the bow of each vessel.

IV.

BURDEN OF PROOF.

In considering the circumstances regarding the collision of the "Beaver" and the "Necanicum", the court should bear in mind the failure of the "Beaver" to stand by the "Necanicum" after the collision. That she did not stand by is manifested primarily by her log, which reads "2:16 full astern, 2:18 full ahead, 2:19 ahead slow, 2:20 full ahead".

This was in defiance of Section 1 of the Act of September 4, 1890, ch. 875, which reads:

"(Sec. 1.) (Duty of masters of vessels in case of collision.) That in every case of collision between two vessels it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without serious danger to his own vessel, crew, and passengers (if any), to stay by the other vessel until he has ascertained that she has no need of further assistance, and to

render to the other vessel, her master, crew and passengers (if any) such assistance as may be practicable and as may be necessary in order to save them from any danger caused by the collision, and also to give to the master or person in charge of the other vessel the name of his own vessel and her port of registry, or the port or place to which she belongs, and also the name of the ports and places from which and to which she is bound. If he fails so to do, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default."

26 Stat. at L. 425.

The reason why the "Beaver" did not stand by the "Necanicum" is alleged to be that the "Beaver" saw the injuries to the "Necanicum", considered them slight and ordered the "Beaver", therefore, ahead. In this connection we would ask the court to examine claimant's exhibit C, which is a photograph showing the injury to the stern of the "Necanicum" and would further ask the court how any person seeing that injury and seeing how close it was to the water line, could callously say that there was no danger of disaster to the "Necanicum" after the collision. As to the effect of the failure to regard the statute, requiring vessels to stand by, we will cite the clear statement of the Circuit Court of Appeals for the Fourth Circuit:

"We construe this statute to mean that, if a master of a vessel that has been in collision with another fails to stay by her and shows no reasonable cause for such failure, the law will presume

that the collision was caused by some negligent act or omission on his part, and, in the absence of proof to the contrary, will fasten upon him the responsibility of the collision. It puts upon him the burden of showing that he was free from fault. It assumes that one who fails to offer assistance to those whose distress is caused by him is presumably at fault in the act which caused the distress, and it denounces pain and penalties against his inhumanity, and holds his ship responsible for the pecuniary fine, but it does not condemn him without a hearing. The obligation imposed is not unqualified, it is carefully guarded by conditions, it permits presumptions to be rebutted by proofs, and it is 'only in the absence of proof to the contrary' that his responsibility is made absolute.' (Though the court here found affirmatively that the vessel was not in fault.)

The Hercules, 80 Fed. 998 at 1001.

See also

The Williamsport, 186 Fed. 184 at 191;

The Lucerne, 148 Fed. 133.

Under this statute, it is evident that the "Beaver" must affirmatively excuse herself from all fault or she will be held liable for the collision.

The lower court, after carefully considering the facts in this case, having weighed the evidence given before it by the witnesses for both vessels, having in mind the character and demeanor of the witnesses from both vessels, and on these facts having found for

the appellee, it is submitted that this court should affirm the judgment of the court below.*

Dated, San Francisco,

June 4, 1917.

Respectfully submitted,

W. S. BURNETT,

THOMAS A. THACHER,

DENMAN AND ARNOLD,

Proctors for Appellee.

* It is noted that appellant, on page 61 of his brief, urges that if this court find that fog prevailed, it simply reverses the decree in the action brought by the San Francisco & Portland SS. Co. with instructions to enter a decree in favor of that company. As pointed out on page 5 of this brief, all the pleadings admit a fog, and the evidence of all persons at the scene of the collision bear this out. Since appellant on page 5 of its brief stated "if fog was prevailing, then confessedly the 'Beaver' was in fault", it cannot possibly claim that appellee is wholly responsible for the damage to the "Beaver". Yet disregarding the most elementary rule of admiralty practice, appellant at the close of its brief urges that the owners of the "Necanicum" be compelled to pay for all the damage sustained by the "Beaver".

United States
Circuit Court of Appeals
For the Ninth Circuit.

CYRUS F. SHELDON,

Appellant,

vs.

GUS MESSERSCHMIDT, CHARLES QUACK-
ENBUSH, and THE JUNEAU CON-
STRUCTION COMPANY,

Appellees.

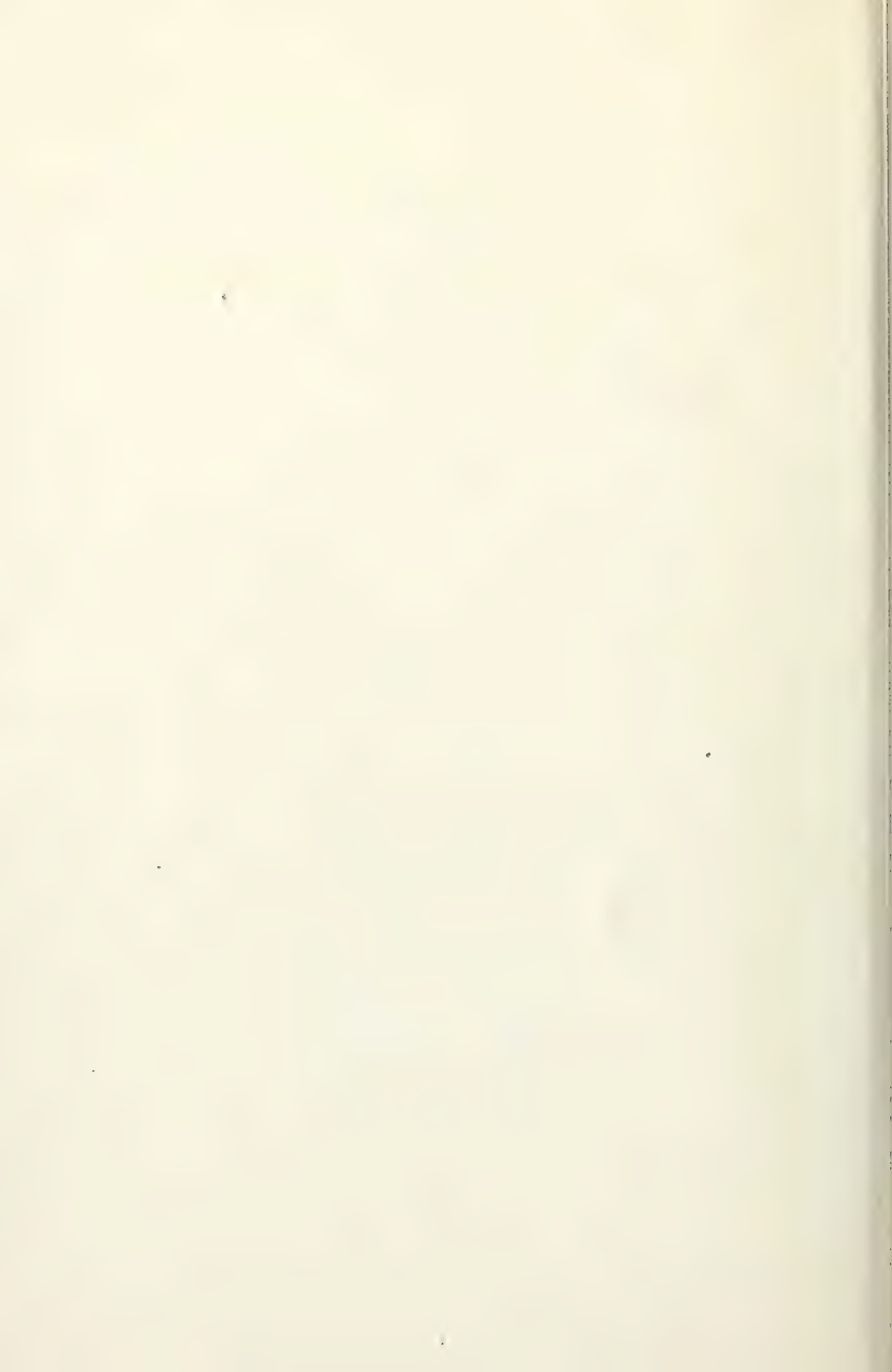
Transcript of Record.

Upon Appeal from the United States District Court for the
District of Alaska, Division No. 1.

Filed

JUL 3 - 1917

F. D. Monckton,
Clerk.



United States
Circuit Court of Appeals
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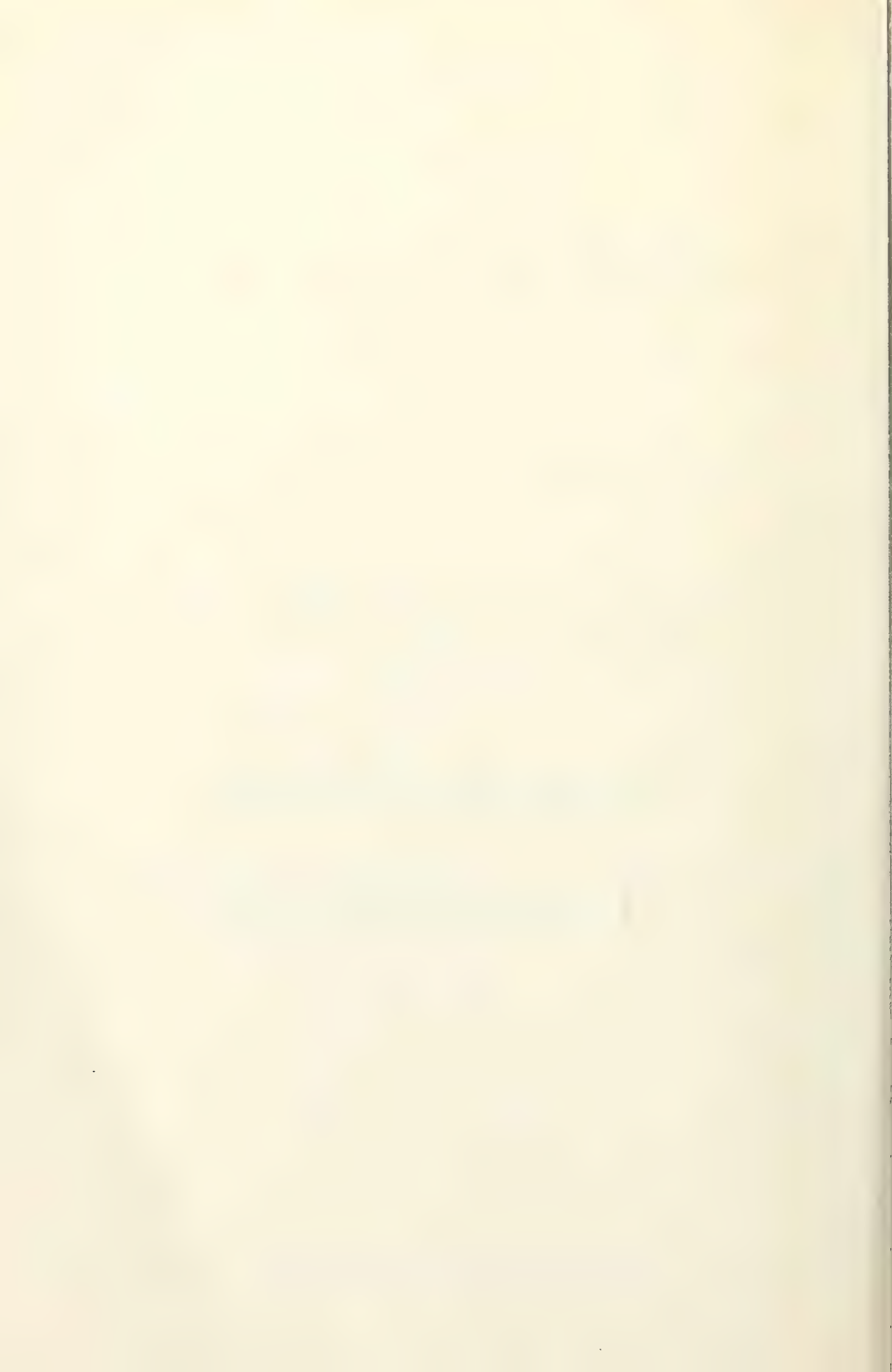
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1073-A.

CYRUS F. SHELDON,

Plaintiff and Appellant,

vs.

GUS MESSERSCHMIDT, CHARLES A.
QUACKENBUSH and THE JUNEAU
CONSTRUCTION COMPANY,

Defendants and Appellees.

Names and Addresses of Attorneys of Record.

CHENEY & ZIEGLER, Juneau, Alaska,

Attorneys for Appellant.

HELLENTHAL & HELLENTHAL, Juneau,
Alaska,

Attorneys for Appellees.

*In the District Court for the District of Alaska, at
Juneau, Division No. 1.*

No. 1073-A.

CYRUS F. SHELDEN,

Plaintiff,

vs.

GUS. MESSERSCHMIDT, CHARLES A.
QUACKENBUSH and THE JUNEAU
CONSTRUCTION COMPANY,

Defendants.

Bill of Complaint.

To the Judge of the District Court, for the District of Alaska, in Division No. 1:

The plaintiff complains of the above-named defendants and shows to the Court:

1.

That the plaintiff is, and for more than seventeen years last past has continuously been, the owner by right of prior continuous possession and actual occupation, and the owner in fee by virtue of plaintiff's Homestead Claim, known and designated by the surveyor general for said Alaska as "Homestead Claim under Act of March 3, 1903, of C. F. Sheldon, U. S. Survey (amended) No. 375," within the Juneau, Alaska Land District, consisting of 47.34 acres of land, situated about one mile northwest from the City of Juneau, Alaska, on Gastineaux Channel, and extending along and abutting upon the meander line, at mean high tide, of said Gastineaux Channel, and for which said homestead claim, plaintiff now holds "Final Certificate No. 06," dated January 11, 1911, issued to plaintiff by C. B. Walker, Register of the U. S. Land Office at said Juneau, Alaska, and in which said Final Certificate No. 06 the said homestead claim of plaintiff and the area thereof is described, as follows, to wit:

Beginning at Cor. No. 1, whence U. S. L. M. No. 3, bears N. 62° 06' W. O. 98 chains; thence N. 48° 03' E. 6 chains; to corner No. 2; thence N. 23. 16 chains to corner No. 3; thence West 26.45 chains to corner No.

4; thence S. 5.48 chains to corner No. 5, M. C. thence meandering (1) S. $37^{\circ} 52'$ E. 5.11 chains, (2) S. $43^{\circ} 15'$ E. 3.90 chains (3) S. $59^{\circ} 31'$ E. 6.80 chains (4) S. $39^{\circ} 14'$ E. 13.88 chains (5) S. $67^{\circ} 10'$ E. 1.60 chains to corner No. 1, the place of beginning, being situated on *on* the shore of Gastineaux Channel; and that plaintiff is entitled to the possession thereof, and now is in the possession of the same. [1*]

2.

That for a distance of two thousand feet, or thereabouts, said homestead claim of plaintiff and lands and premises, abut upon and is bounded by the waters of said Gastineaux Channel, an arm of the Pacific Ocean, navigable for vessels of all sizes, and in which the tide ebbs and flows.

3.

That the plaintiff many years last past, and during his continuous occupancy and possession, as aforesaid, at much cost and expense to plaintiff, has erected suitable buildings for trading and residence purposes, and made other valuable improvements upon his said homestead claim, land and premises, and all of such said improvements were made, as aforesaid, and placed upon said land and homestead, long before said defendants or either of them, came to said Juneau, Alaska.

4.

That on about December 29, 1913, or thereabout, while plaintiff was so possessed of said homestead, land and premises, the defendants without right or

*Page-number appearing at foot of page of original certified Transcript of Record.

title so to do, entered upon the tide-lands lying immediately in front and abutting upon said homestead lands and premises of plaintiff, and took possession of one hundred and six (106) feet thereof in width, commencing at a point, the same being corner No. 1, of Homestead Survey No. 375 as amended, and running along the boundary line of said homestead along mean high tide, a distance of 106 feet, being 106 feet along the meander line of said Gastineaux Channel, and extending throughout said width of 106 feet south or down to the deep water of said Gastineaux Channel, and the defendant set posts or piles and caused posts and piles to be set and driven upon said tide-land, and as plaintiff is informed and so believes, and therefore so alleges, the said defendants intend to erect or cause to be erected on said posts and piles buildings and other structures, and threaten and will drive and are now placing and setting more posts or piles upon said tide-land, and will [2] improve the said tide-land "and thereby deprive the plaintiff of his right of ingress to and egress from *from* his said upland to and over said tide-land and to and from said navigable waters, unless restrained by an order of this Court."

J. T. R.
D. C.
4/26/15

5.

That the defendants, at the same time above mentioned, while plaintiff was so possessed, as aforesaid, of said homestead claim, land and premises, without right, or title to so do, entered upon the said above described tide-land and premises and took possession of a further piece or part thereof, to wit, of the width of seventy feet, commencing at a point on the me-

ander or boundary line of said homestead claim, about 430 feet northwest from said corner No. 1, of said Amended Homestead Survey No. 375, and running thence along said boundary line N. W. on the meander line of said Gastineaux Channel, a distance of seventy feet, and extending throughout said width of 70 feet south or down to deep water of said Gastineaux Channel, and the defendants set posts or piles and caused posts or piles to be set or driven upon said tide-land, and as plaintiff is informed and so believes, and therefore so alleges, the said defendants intend to erect or cause to be erected on said posts and piles buildings and other structures, and threaten and will set and drive and now are placing and setting more posts (and capping the same) upon said tide-land, and improve the said tide-land, unless restrained by an order of this Court.

6.

That by reason of the premises aforesaid and by reason of the plaintiff's ownership in, and occupancy of, said lands abutting upon said navigable waters of said Gastineaux Channel, complainant is entitled to the use and occupancy of said tide-lands, together with all riparian and littoral rights given and granted to owners of lands bounded by navigable waters; and the defendants by reason of their acts in taking possession of said tide-lands, have deprived the plaintiff of the free use and occupancy of, and of plaintiff's riparian and littoral rights in and to the said tide-lands to plaintiff's great and irreparable injury and damage, and threaten to further injure and damage plaintiff by erecting buildings and other improve-

ments upon said tide-lands, and occupying the same and appropriating to their own use and benefit said tide-lands. [3]

7.

Plaintiff has no plain, speedy, adequate and complete remedy at law, and the defendants well knew of plaintiff's rights in the premises before said improvements, posts and piles were placed upon said tide-lands, having had notice of the same.

Wherefore, plaintiff prays that this Court may make and enter its order and decree, adjudging and decreeing this plaintiff to be entitled to the free use and occupancy of said tide-lands, and entitled to exercise all riparian and littoral rights over the same.

That this Court may make and enter its further order and decree, restraining and enjoining the defendants, and each of them, from permitting the posts or piles, together with all improvements placed thereon by them, or at their instance, to remain on said tide-lands, and forever restraining the defendants, and each of them, from setting or placing posts or piles, erecting or constructing any buildings or improvements upon any of said tide-lands, or in any manner interfering with plaintiff's right in the free use and occupancy of said tide-lands.

And plaintiff prays for such other and further relief as to the Court may seem equitable and just in the premises, and that the defendants pay the costs and disbursements of this suit or action.

JOHN G. HEID,
Attorney for Plaintiff.

United States of America,
District of Alaska,—ss.

C. F. Sheldon, being first duly sworn says: I am the plaintiff in the foregoing entitled suit, that I have read the foregoing complaint and know the contents thereof, that the same is true, as I verily believe.

C. F. SHELDON.

Subscribed and sworn to before me this 2d day of January, 1914.

[Notarial Seal]

GUY McNAUGHTON,
Notary Public for Alaska.

Filed in the District Court, District of Alaska, First Division, Jan. 2, 1914. J. W. Bell, Clerk. By H. Malone, Deputy. [4]

*In the District Court for the Territory of Alaska,
Division No. One, at Juneau.*

Case No. 1073-A.

CYRUS F. SHELDON,

Plaintiff,

vs.

GUS. MESSERSCHMIDT, CHARLES A.
QUACKENBUSH and the JUNEAU CON-
STRUCTION COMPANY.

Defendant.

Answer.

Comes now the defendants for answer to the complaint herein, admit, deny and allege:

1.

The defendants deny each and every allegation in said complaint contained.

Further answering by way of new matter, the defendants allege:

1.

That the ground which they are in possession of is on the tide-flats of Gastineau Channel below the line of mean high-tide; that the premises occupied by these defendants and the structures placed and maintained thereon do not interfere with plaintiff's right of ingress and egress to and from deep water of Gastineau Channel; that the plaintiff has never used his right of ingress and egress to and from deep water and that the defendants are informed and believe, and therefore allege that this plaintiff does not intend to use said right of ingress and egress.

WHEREFORE these defendants pray that the cause be dismissed and that they be allowed their costs and disbursements.

HELLENTHAL & HELLENTHAL,

Attorneys for Defendant. [5]

United States of America,
Territory of Alaska,—ss.

Gus. Messerschmidt, being first duly sworn, on oath deposes and says: That he is one of the defendants in the above-entitled action; that he has read the foregoing Answer, knows the contents thereof and believes the same to be true.

GUS. MESSERSCHMIDT.

Subscribed and sworn to before me this 3d day of June, A. D. 1915.

[Notarial Seal] SIMON HELLENTHAL,
Notary Public for Alaska.

My commission expires Nov. 30, 1917.

Due service by copy of the foregoing admitted this
_____ day of June, 1915.

_____,
Attorney for Plaintiff.

Filed in the District Court, District of Alaska, First Division, Jul. 7, 1915. J. W. Bell, Clerk. By John T. Reed, Deputy. [6]

*In the District Court for the Territory of Alaska,
Division No. 1.*

No. 1073-A.

CYRUS F. SHELDON,
Plaintiff,

vs.

GUS. MESSERSCHMIDT, CHARLES QUACK-
ENBUSH and the JUNEAU CONSTRUC-
TION COMPANY,
Defendants.

Demurrer.

Comes now the plaintiff by his attorney and demurs to the answer of the defendants herein for the reason that the said answer does not state facts sufficient to constitute a defense to the complaint of plaintiff herein.

JOHN G. HEID,
Attorney for Plaintiff.

Due service of a copy of the within demurrer is hereby admitted at Juneau, Alaska, this 3d day of August, 1915.

HELLENTHAL & HELLENTHAL,
Attorneys for Defendants.

Filed in the District Court, District of Alaska,
First Division, Aug. 7, 1915. J. W. Bell, Clerk.
By —————, Deputy. [7]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1073-A.

CYRUS F. SHELDON

vs.

GUS. MESSERSCHMIDT et al.

Order Overruling Demurrer to Answer.

The demurrer of plaintiff to the answer of the defendants herein is submitted to the Court without argument, and forthwith overruled.

Dated Thursday, August 12, 1915.

ROBERT W. JENNINGS.

District Judge. [8]

*In the District Court for the Territory of Alaska,
Division No. 1, at Juneau.*

No. 1073-A.

CYRUS F. SHELDON,

Plaintiff,

vs.

GUS. MESSERSCHMIDT, CHARLES A.
QUACKENBUSH and the JUNEAU CON-
STRUCTION COMPANY,

Defendants.

Reply.

The plaintiff replies to the answer of defendants and alleges:

I.

Replying to I of defendants' further answer, this plaintiff denies that said ground, referred to by defendants, is all on the tide-flats of Gastineau Channel below the line of mean high tide and that defendants are in possession of the same without interference with plaintiff's right of, ingress and egress to and from deep water of said Gastineau Channel; and as to the remainder of the allegations contained in said paragraph, as well as all of them, plaintiff says that said further answer does not state facts sufficient to constitute a defense to said complaint.

WHEREFORE, plaintiff asks judgment against defendants as prayed for in his complaint filed herein, and for costs.

JOHN G. HEID,
Attorney for Plaintiff.

United States of America,
District of Alaska,—ss.

C. F. Sheldon, being first duly sworn says: I am the plaintiff in the above-entitled action, that I have read the foregoing reply and know the contents thereof, that the same is true, as I verily believe.

C. F. SHELDON.

Subscribed and sworn to before me this —— day of December, 1915.

[Notarial Seal]

JOHN G. HEID,

Notary Public for Alaska.

My commission expires Jan. 9th, 1918.

Filed in the District Court of Alaska, First Division. Jan. 13, 1916. J. W. Bell, Clerk. By _____, Deputy.

[Endorsed]: No. 1073-A. In the District Court for Alaska, Div. No. 1. C. F. Sheldon vs. Gus. Messerschmidt et al. Reply. J. G. Heid, Atty. for Plff.

Due and legal service of a copy of the within reply is hereby admitted at Juneau, Alaska, January 14th 1916.

HELLENTHAL & HELLENTHAL,

Attorneys for Defendants. [9]

*In the District Court for the Territory of Alaska,
Division No. 1, at Juneau.*

No. 1073-A.

CYRUS F. SHELDON,

Plaintiff,

vs.

GUSTAVE MESSERSCHMIDT, CHARLES A.
QUACKENBUSH and THE JUNEAU
CONSTRUCTION COMPANY,

Defendants.

Judgment.

This cause coming on for trial the 8th day of November, 1916, and the plaintiff having introduced all of his evidence, and having rested, and the attorney for the defendants thereupon having made a motion for nonsuit on account of failure to show any equity for an injunction. And the Court having considered said matter finds no evidence that defendants have interfered or are about to interfere with plaintiff's ingress or egress from or to the upland to or from the navigable water, nor that plaintiff has used, or is about to use his said right of ingress or egress:

WHEREFORE, it is ORDERED, ADJUDGED AND DECREED that the above-entitled cause be dismissed and that the defendants be allowed their costs to be taxed by the clerk.

Dated at Juneau, this 7th day of February, 1917.

The plaintiff is hereby given ninety (90) days from the date of the foregoing judgment, in which to prepare, serve and file his bill of exception in the above-entitled cause.

ROBERT W. JENNINGS,
District Judge.

Entered Court Journal, No. M, page 387.

Filed in the District Court, District of Alaska,
First Division. Feb. 7, 1917. J. W. Bell, Clerk.
By C. Z. Denny, Deputy. [10]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1073-A.

CYRUS F. SHELDON,

Plaintiff,

vs.

GUS MESSERSCHMIDT, CHARLES QUACK-
ENBUSH and THE JUNEAU CONSTRUC-
TION COMPANY,

Defendants.

Bill of Exceptions.

Be it remembered that this cause came on to be tried before Honorable ROBERT W. JENNINGS, the Judge of this court, on the 8th day of November, 1916, at Juneau. Plaintiff appeared in person and by his counsel, John G. Heid, Esq. Defendants appeared in person and by their attorneys, Messrs. Hellenthal & Hellenthal. Opening statements having been made by counsel for each side, the following proceedings were had: [11]

*In the District Court for the District of Alaska,
Division No. One, at Juneau.*

No. 1073-A.

CYRUS F. SHELDON,

Plaintiff,

vs.

GUS MESSERSCHMIDT, CHARLES QUACK-
ENBUSH and THE JUNEAU CONSTRUC-
TION COMPANY,

Defendants.

Transcript of Testimony. [12]

Testimony of Cyrus F. Sheldon, in His Own Behalf.

CYRUS F. SHELDON, the plaintiff herein, upon being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HEID.)

Q. What is your name, and where do you reside?

A. My name is Cyrus F. Sheldon; I live on my homestead outside of town.

Q. Are you the plaintiff in this case? A. I am.

Q. I will ask you to look at this paper and see if you can identify it.

A. I do; this is a copy of my location notice.

Q. Of what? A. Homestead claim.

Q. The one in issue herein? A. Yes.

Mr. HEID.—I offer this in evidence, if your Honor please.

(Testimony of Cyrus F. Sheldon.)

Mr. HELLENTHAL.—I object to it as immaterial.

The COURT.—Objection overruled.

(Whereupon said location notice was received in evidence and marked Plaintiff's Exhibit "A.")

Mr. HEID.—I now desire to offer in evidence a further notice on this tract of land.

Mr. HELLENTHAL.—I object to this as immaterial—it shows it has been abandoned.

The COURT.—Objection overruled.

(Whereupon said notice was received in evidence and marked Plaintiff's Exhibit "B.")

Q. I ask you what this document is. (Handing paper to witness.)

A. It is a quitclaim deed. [13]

Q. Dated the 6th day of January, 1905?

A. Yes.

Mr. HEID.—I offer that in evidence.

Mr. HELLENTHAL.—I object for the same reason.

The COURT.—This is an equity case and if it is immaterial it cannot hurt you, and if it is material it might be important.

Objection overruled.

(Whereupon said deed was received in evidence and marked Plaintiff's Exhibit "C.")

Mr. HEID.—I next offer in evidence the official plat, posted on the ground, issued by the surveyor-general for Alaska, for the Sheldon homestead claim, survey number 375.

The WITNESS.—That is the official plat that was

(Testimony of Cyrus F. Sheldon.)

posted after the period of publication.

Mr. HELLENTHAL.—I have no objection to it—it makes no difference whether it was posted or not.

(Whereupon said plat was received in evidence and marked Plaintiff's Exhibit "D.")

Mr. HEID.—I also want to introduce the notice of application for homestead entry posted at the same time as the official plat was posted.

Mr. HELLENTHAL.—That is all incorporated in the final receipt, and that is the judgment of a tribunal that considers all those propositions before the final receipt is issued—this is all superfluous and encumbers the record, and is immaterial.

The COURT.—Objection overruled.

(Whereupon said application for homestead entry was received in evidence and marked Plaintiff's Exhibit "E.")

Mr. HEID.—I now desire to offer the certificate of final entry issued by the registrar of the general land office at Juneau, Alaska, to the plaintiff, Cyrus F. Sheldon, for homestead number 375. [14]

Mr. HELLENTHAL.—I object to it for the same reason I stated before.

The COURT.—Objection overruled.

(Whereupon said certificate of final entry was received in evidence and marked Plaintiff's Exhibit "F.")

Mr. HEID.—That is all for the present.

(Witness excused.) [15]

Testimony of H. P. Crowther, for Plaintiff.

H. P. CROWTHER, introduced as a witness on behalf of the plaintiff, being duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HEID.)

Q. What is your name? A. H. P. Crowther.

Q. What is your occupation?

A. United States deputy surveyor.

Q. How long have you resided in and about Juneau? A. Since 1905.

Q. Are you acquainted with United States survey number 375, the survey known as the Sheldon homestead survey? A. I am.

Q. Are you familiar with the boundaries along the meander line of Gastineau Channel?

A. Yes, sir.

Q. Do you know where the defendant Messerschmidt and his associates have erected some structures in the way of piling and buildings in front of this homestead entry?

A. I know what Mr. Sheldon told me was Mr. Messerschmidt's improvement on that waterfront about twelve months ago, but I haven't been out there since.

Q. The time you were out there did you make any survey of any lines?

A. I set out the line of ordinary high water.

Q. What did you find in reference to those structures placed there by the defendants as being in con-

(Testimony of H. P. Crowther.)

flict with any of those lines—lines of ordinary high-water?

Mr. HELLENTHAL.—Your Honor, I object to that for the reason that the buildings are situated on tide-lands, and tide-lands, as ordinarily understood, are below the ordinary line of [16] high water; if they are above the line of ordinary high water it could not be tried out in this case.

The COURT.—The objection is overruled.

A. The improvements which were pointed out to me by Mr. Sheldon as having been placed there by Mr. Messerschmidt and others were partly on the upland of the Sheldon homestead and partly on the tide-lands abutting the homestead—in other words, a portion of the structure was above the line of ordinary high water and a portion of it was below.

Q. The obstruction you found placed there on the tide-land abutting the upland of the Sheldon survey number 375 is an obstruction, isn't it, between the upland and the tide-lands, or deep water?

A. It is right along the tide-line.

Mr. HELLENTHAL.—That is a conclusion—let him state what there is there.

The COURT.—I imagine he is going on to tell what the obstruction consists of—objection overruled.

A. The structures placed there in the manner I have already stated are partly on the tide-land and partly on the upland, and they cover a portion of the meander line of the frontage of that survey; and they consist of piling, capping and platforms.

(Testimony of H. P. Crowther.)

Q. Do you know for what length and extent the structures continue—what they cover?

A. I cannot tell you the length with regard to the defendant Messerschmidt, but the total length of the obstructions placed by everybody there that I saw would amount to something like 500 feet, beginning at the southwest corner of the Sheldon homestead and extending northwest along its front.

Q. Now, the nature and character of the obstruction you referred to, would they prevent ready ingress and egress from the upland to the navigable water? [17]

Mr. HELLENTHAL.—I object to that as a conclusion.

The COURT.—It is a pretty general question, Mr. Heid.

The WITNESS.—Well, it tends to form an obstruction to ingress and egress. I had to duck my head to get underneath it—a shorter man might not have any trouble.

Q. He would be crawling around between the piling underneath; is that it? A. Yes.

Q. The piling as it stands there, wouldn't that be an absolute obstruction there and cut off ingress and egress from and to the navigable water?

A. It certainly would have that tendency.

Mr. HEID.—That is all.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. Mr. Crowther, you don't know exactly how much of that ground is covered there by the defendant Messerschmidt?

(Testimony of H. P. Crowther.)

A. At this time, no, sir; I haven't examined it for, I think, twelve months.

Q. And you measured it altogether, the different houses placed there and the piling, and it was about 500 feet long? A. That is my impression of it.

Q. You don't know how much belongs to one party and how much belongs to another party, do you?

A. No, sir, I don't.

Q. Mr. Crowther, do the meander line at that place and the line of mean high tide coincide?

A. I am of the opinion they are not exactly the same.

Q. They are two different things, aren't they?

A. That is my impression.

Q. And they are not the same thing?

A. No, but the difference is very slight. [18]

Q. The meander line does not follow the sinuosities of the stream?

A. You are referring to the meander line as shown upon the official plat?

Q. The meander line in all cases.

A. I do not agree with you on that.

Q. The meander line on the official plat, then?

A. The meander line on the official plat approximated the existing line of ordinary high water at the time the survey was made, but owing to gravel having been removed from that waterfront the line has been changed considerably.

Q. The line has been changed by the removal of gravel? A. Yes.

(Testimony of H. P. Crowther.)

Q. It has made the line of mean high tide further in?

A. In places along there it has, yes, as compared with the conditions which existed at the time of the official survey.

Q. And that is right near to where these houses have been built where that gravel was taken out?

A. Some of it was taken out right close by there.

Mr. HELLENTHAL.—That is all.

(Questions by the COURT.)

Q. Mr. Crowther, I understand you to say that these obstructions consist of piling and capping and platforms?

A. It was in that shape when I visited it about twelve months ago.

Q. Does the platform extend all over the piling?

A. Yes, sir.

Q. The whole thing is a platform?

A. Yes, that is my recollection of it.

Q. When you say it prevents ingress and egress, do you mean ingress and egress in preventing boats getting up to the upland?

A. It certainly would have that tendency; you would have to [19] thread your way amongst the piling.

Q. Would it prevent ingress and egress for any other purpose?

A. Yes; if anyone were going to remove gravel with teams he couldn't take it through the piling; you can crawl around underneath and can get through the piling by ducking under the capping, but

(Testimony of H. P. Crowther.)

it certainly tends to obstruct it—that is what I should have said.

The COURT.—That is all.

Redirect Examination.

(By Mr. HEID.)

Q. Now, in case the tide was high and came up to those obstructions would it cut off the ingress and egress to and from the upland to the navigable water—that is, deep water?

Mr. HELLENTHAL.—I object to that—he has already testified to it.

The COURT.—Yes; objection sustained.

Recross-examination.

(By Mr. HELLENTHAL.)

Q. Are there cabins on this platform, or is the platform covered?

A. At the time of my visit part of it was covered and part of it was uncovered.

Q. If a person wanted to build a wharf there and make a place for large ships, that platform would facilitate ingress and egress under those conditions, would it not? A. Yes, I think it might be said to.

Q. Under certain conditions?

A. Under certain conditions. If the wharf were built at the same elevation as that platform—that is, the floor of the wharf, and there was an approach built at the same elevation, it might.

Mr. HEID.—I move to strike that last question and answer.

The COURT.—It is so self-apparent that it is not necessary for [20] the witness to testify to it.

Mr. HELLENTHAL.—That is all.

(Witness excused.) [21]

**Testimony of Cyrus F. Sheldon, in His Own Behalf
(Recalled).**

CYRUS F. SHELDON, the plaintiff herein, upon being recalled as a witness in his own behalf, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. HEID.)

Q. Mr. Sheldon, do you know the obstructions placed in front of your homestead, survey number 375, by the defendants? A. I do.

Q. Describe them to the Court, and also where they are situated.

A. Well, there is one a hundred and some feet right up next to this corner—that would be the southwest corner, I believe—and then there is another one about 350 or 400 feet further down there where that cabin used to stand.

Q. What is the dimension of the first?

A. Well, I should think the first one is about—

The COURT.—Just a moment—who owns the first one?

The WITNESS.—The people who built it didn't give me much satisfaction but I later found out it belongs to Messerschmidt and he doesn't deny it; it is 106 or 107 feet front, I should think.

Q. And how wide, about?

A. Oh, I should think probably 30 or 35 feet.

(Testimony of Cyrus F. Sheldon.)

Q. What is the nature of that structure—describe it?

A. Well, it is posts and caps, and then floor joists on the caps and floored over—platforms.

Q. Any cabins on it?

A. No, there is no cabins on it.

Q. I will ask you whether or not that constitutes and is an obstruction?

Mr. HELLENTHAL.—I object to that.

The COURT.—He may answer the question, because the Court knows what general language is and what specific language is, and will take all this into consideration when it renders its opinion. [22]

A. It surely is.

Q. In what manner would it be an obstruction to you in the enjoyment of your upland in case you desired to reach deep water at low tide?

A. I think it would absolutely cut me off because if they had a right to the possession of it they would undoubtedly keep me off as a trespasser.

Q. Now, you say the first obstruction consists of 106 or 107 feet? A. Yes.

Q. What is the other obstruction that you spoke of?

Mr. HELLENTHAL.—I object to that because it shows that the obstruction is in regard to some other defendant in some other case.

The WITNESS.—It is the same case I am going to swear about.

The COURT.—Obstructions maintained by Messerschmidt?

(Testimony of Cyrus F. Sheldon.)

The WITNESS.—Yes. I should think about 400 feet from the corner there—something like 'that, anyway.

Q. What is the nature of that obstruction?

A. There is another foundation about 70 feet frontage on the land there, partly above the mean high tide and partly below it, and that consists of posts and caps and floor joists, and they made a little floor there, but it isn't entirely floored over.

Q. Does that constitute an obstruction?

A. It does.

Mr. HELLENTHAL.—I object to that.

Q. Preventing you from the enjoyment of your land if you desire to reach deep water at low tide?

A. It does.

Mr. HEID.—That is all. [23]

Cross-examination.

(By Mr. HELLENTHAL.)

Q. Mr. Sheldon, this plat introduced here represents that land (referring to Plaintiff's Exhibit "D")—the place marked "Sheldon's House," is that the place where you reside? A. It is.

Q. Have you any other buildings on the upland?

A. No.

Q. That is the only building you have on the upland? A. Yes.

Q. And the rest of the upland is unimproved land—most of it is unimproved?

A. No, it isn't; there is a whole lot of it cleared.

Q. What part of it is cleared?

(Testimony of Cyrus F. Sheldon.)

A. All of this is cleared in front of these obstructions.

Q. You mean it has been slashed?

A. Yes, the brush cut off of it.

Q. Would you call that cleared ground when you slash it and cut the timber out of it?

A. Surely must be; the stumps are not dug out,—

Q. The stumps are not dug out and the underbrush is there, isn't it?

A. No, the underbrush is all cleared out.

Q. It has all grown up again, hasn't it?

A. No.

Q. When did you cut that out?

A. A couple of years ago; nothing there but grass.

Q. And the stumps of the underbrush are still there? A. Yes.

Q. And the stumps of the trees are still there?

A. Yes.

Q. And that is all true of the upland—

Mr. HEID.—I desire to object to all that because if the Government [24] has finally passed upon the title it is absolutely immaterial what he has done.

The COURT.—Objection overruled.

Q. And your house is about how many feet away from the place where these platforms have been built?

A. Oh, to the platform nearest to my house it would probably be 700 or 800 feet— probably 700 feet.

Q. And how far is your house from the north

(Testimony of Cyrus F. Sheldon.)

boundary line of your property—that is, from corner number 5?

A. I don't know, but you ought to be able to see it on this line, but he don't seem to give the distance there.

Q. What have you done in the way of wharfing out? Have you done anything in the way of building a wharf from your upland over the tide-lands?

A. No.

Mr. HELLENTHAL.—That is all.

Redirect Examination.

(By Mr. HEID.)

Q. How long have you resided on this homestead of yours?

A. I have resided there since the spring of 1895.

Q. Has it been your home?

A. Yes; I have resided there.

Q. You have no other place of residence but that?

A. No, I have had no other place of residence except that outside of when I was out doing assessment work.

Q. And you are still residing there. A. Yes.

Q. Been in continuous occupation and possession of that ground? A. Yes.

Mr. HEID.—That is all.

(Witness excused.) [25]

Testimony of George F. Miller, for Plaintiff.

GEORGE F. MILLER, introduced as a witness on behalf of the plaintiff, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

(Testimony of George F. Miller.)

Direct Examination.

(By Mr. HEID.)

Q. Your name and place of residence?

A. George F. Miller; Juneau.

Q. Do you know the plaintiff's homestead entry, known as the Sheldon Homestead Entry, Survey number 375? A. Yes.

Q. Have you been over the ground in recent years? A. Yes, I have.

Q. Do you know of any obstruction being placed there in front of this homestead entry by the defendants? A. Yes.

Q. Are they placed there at the point as described by Mr. Sheldon just a short time ago? A. Yes.

Q. Now, have you carefully looked at those obstructions or those structures placed there abutting the meander line of Gastineau Channel of this homestead entry? A. Yes, I looked at them.

Q. Now, describe to the Court what those structures are.

A. Piles and joists and some of them is floored.

Q. Now, I will ask you the character of those structures you saw there, whether they are an obstruction to the upland owner if he desires to get out to deep water at low tide, that part covered by these obstructions?

A. He wouldn't need them if it didn't get too low tide.

Q. At high tide can you get down there?

A. No, you cannot.

Q. Isn't it a fact that these structures would be an

(Testimony of George F. Miller.)

obstruction [26] to the use and enjoyment of the upland by the upland owner if he wanted to get down to deep water from that strip of ground?

A. Yes, it would be an obstruction.

Q. Now, that holds good with all the obstructions placed there by the defendants, don't it?

A. Yes.

Mr. HEID.—That is all.

Cross-examination.

(By Mr. HELLENTHAL.)

Q. You have been on the ground, haven't you, Mr. Miller? A. Yes.

Q. And you know the condition of the upland in front of which these piling are placed? A. Yes.

Q. What kind of upland is that?

A. Oh, the timber was slashed off.

Q. Just unimproved land, partially cleared?

A. Yes; there are stumps, but the timber is slashed off.

Mr. HELLENTHAL.—That is all.

(Witness excused.)

PLAINTIFF RESTS. [27]

Mr. HELLENTHAL.—The defendant moves for a nonsuit at this time, for the reason that plaintiff has not shown that these structures placed upon the tidelands interfere with plaintiff's right of ingress and egress; for the reason that plaintiff's right of ingress and egress, in the first place, is dependent upon a necessity for use, and for the reason that the structures shown to have been placed thereon are such as to facilitate plaintiff's right of ingress and egress.

The COURT.—The motion for a nonsuit is granted. [28]

Plaintiff's Exhibit "A"—Location Notice of Homestead Claim.

Know all men by these presents, that I, Cyrus F. Sheldon, of Juneau, Alaska, hereby record that certain piece or parcel of land, heretofore occupied by me, for more than seven years last past, as a homestead claim, and still now claim the same as and for a homestead claim, situated in Harris Mining District, Alaska, and more particularly described, as follows, to wit:

Beginning at a point, about 200 feet southeast of and from U. S. Initial Monument, situated at mean high tide mark of Gastineaux Channel, at or near the west corner of the incorporated limits of said Juneau, Alaska, running thence due north 120 rods, thence west 160 rods, thence due south to mean high tide mark of said Gastineaux Channel, thence southeast, along the meandering line of said Gastineaux Channel, 160 rods, to the place of beginning.

This claim is made under the act of Congress, approved March 3, 1903.

CYRUS F. SHELDEN,
Claimant.

Plffs. Exhibit No. "A." Received in Evidence Nov. 8, 1916. In cause No. 1073-A. J. W. Bell, Clerk. By John T. Reed, Deputy. [29]

Plaintiff's Exhibit "B"—Notice of Location.
SHELDEN AND MILLER TRADING SITE
LOCATION.

Juneau, Alaska, Feb. 20th, 1895.

Notice is hereby given that we the undersigned citizens of the United States do claim this ground as a Trading Site.

Beginning about 200 feet in a southeast direction from a Government Monument situated on the west side of the mouth of Gold Creek in Harris Mining District, District of Alaska, running 320 rods in a northwest direction up the beach, thence 80 rods in a northeast direction, thence 320 rods in a southeast direction, thence 80 rods in a southwest direction to place of starting. To be known as the Sheldon and Miller Trading Site.

C. F. SHELDON,
GEO. MILLER,
Locators.

United States of America,
District of Alaska,—ss.

I hereby certify that the foregoing is a true, correct and complete transcript of the record, and of the whole thereof, as the same appears of record in Book "G" or 2 of Lots, records of the Juneau Recording District, District of Alaska.

Witness my hand and official seal this 13th day of January, 1905.

[Seal of Recorder]

H. H. FOLSOM,
Recorder Juneau Recording District.

District of Alaska,
Juneau Recording District,—ss.

The within instrument was filed for record at 9 o'clock A. M. Feb. 21, 1895, and duly recorded in book G, on page 155, of the records of said District.

H. W. MELLEN,
District Recorder.

Plffs. Exhibit "B." Received in Evidence Nov. 8, 1916. In Cause No. 1073-A. J. W. Bell, Clerk. By John T. Reed, Deputy. [30]

Plaintiff's Exhibit "C"—Quitclaim Deed, C. F. Miller et ux. to C. F. Sheldon.

THIS INDENTURE, made this 6th day of January, in the year of our Lord, one thousand nine hundred and five, between George F. Miller & Elizabeth Miller, his wife, of Juneau, Alaska, parties of the first part, and C. F. Sheldon of the same place, the party of the second part, WITNESSETH:

That the said parties of the first part, for and in consideration of the sum of one 00/100 dollars, lawful money of the United States of America, to them in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, have remised, released and forever quitclaimed, and by these presents do remise, release and forever quitclaim, unto said party of the second part, and to his heirs and assigns, all the right, title, interest, and estate of said parties of the first part in and to all that certain lot, piece, or parcel of land, situate, lying and

being near Juneau, in the District of Alaska, and particularly described as follows, to wit:

All their right, title and interest in and to the Sheldon & Miller Trading Site, situated adjoining the Evergreen Cemetery and more particularly described in the location notice thereof of record in the office of the U. S. Commissioner of Juneau precinct, Alaska, wherein the same is located in book 2 or G of lot locations, at page 155, to which reference is here made.

TOGETHER with all and singular, the fixtures, improvements, rights, privileges, tenements, hereditaments, and appurtenances, thereunto belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD, all and singular the said premises, together with the appurtenances, unto the said party of the second part, and to his heirs and assigns forever. And the said grantors, for themselves, their heirs, executors, administrators and assigns, hereby covenant and agree that the said property is [31] free from all encumbrances and that they have good right to convey the same.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

GEO. F. MILLER. [Seal]

ELIZABETH MILLER. [Seal]

Signed, sealed and delivered in the presence of:

C. C. HEID.

H. A. DAY.

United States of America,
District of Alaska,—ss.

I, H. A. Day, a notary public in and for the District of Alaska, duly commissioned, sworn and qualified, do hereby certify that on this 6th day of January, A. D. 1905, before me personally appeared Geo. F. Miller & Elizabeth Miller, his wife, to me well known to be the individual described in and who executed the foregoing instrument, and acknowledged to me that they executed the same as their free and voluntary act and deed, and for the uses and purposes therein mentioned.

And Elizabeth Miller, wife of the said Geo. F. Miller, upon an examination by me separate and apart from her said husband, when the contents of said instrument were by me fully made known to her, and she was by me fully apprised of her rights and of the effect of signing said instrument, did, freely and voluntarily, separate and apart from her said husband, acknowledge the same, acknowledging that she did voluntarily, of her own free will and without fear or coercion from her said husband, execute the same as her free and voluntary act and deed and for the uses and purposes therein mentioned.

Given under my hand and official seal this 6th day of January, A. D. 1905.

[Notarial Seal]

H. A. DAY,

Notary Public in and for the District of Alaska.

My commission expires ————— [32]

[Endorsed]: (\$1.60 Pd. 2:15 P. M. Jany. 9, 1904.)
Quitclaim Deed from G. F. Miller et ux. to C. F. Sheldon. From law offices of Heid & Day, Juneau, Alaska.

District of Alaska, Juneau,—ss.

The within instrument was filed for record at 2:15 o'clock P. M. Jany. 9, 1905, and duly recorded in book 20 of deeds, on page 339, of the records of said district.

H. H. FOLSOM,
District Recorder.

Plffs. Exhibit No. "C." Received in Evidence
Nov. 8, 1916. In Cause No. 1073-A. J. W. Bell,
Clerk. By John T. Reed, Deputy. [33]

United States of America,
District of Alaska,
Division No. 1,—ss.

I, the undersigned, clerk of the District Court for the District of Alaska, Division No. One, do hereby certify that the hereto attached is a full, true and correct copy of the original order transmitting plaintiff's Original Exhibit "D" in cause No. 1073-A, Sheldon vs. Messerschmidt et al., of record in my office.

IN TESTIMONY WHEREOF, I have subscribed my name and affixed the seal of the said Court at Juneau, Alaska, this 31st day of March, 1917.

[Seal]

J. W. BELL,
Clerk.

By _____,
Deputy [33½]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1073-A.

CYRUS F. SHELDON,

Plaintiff,

vs.

GUS MESSERSCHMIDT, CHARLES QUACK-
INBUSH, and THE JUNEAU CON-
STRUCTION COMPANY,

Defendants.

**Order Transmitting Plaintiff's Original Exhibit
"D."**

Upon oral motion of plaintiff, it appearing that Plaintiff's Exhibit "D," in the above-entitled cause, is a patent plat, being U. S. Survey No. 375; and,

It further appearing that it is necessary that said exhibit "D" be made a part of the bill of exceptions in this cause on appeal:

NOW, THEREFORE, it is hereby ordered that the clerk of this court be and he is hereby authorized and instructed to attach said original exhibit "D," to a certified copy of this order, and to include said certified copy of this order together with said exhibit "D," attached hereto in the bill of exceptions in this cause in order that said exhibit may be withdrawn from the files of this court and transmitted to the Circuit Court of Appeals.

Done in open court this 26th day of March, A. D.
1917.

ROBERT W. JENNINGS,
Judge.

Entered Court Journal No. N, Page 60.

OK.—H. & H.

Filed in the District Court, District of Alaska,
First Division. Mar. 26, 1917. J. W. Bell, Clerk.
By C. Z. Denny, Deputy. [34]

44' Exhibit No. *A*
 Received in evidence
 NOV 8 1918
noted 1073-6
 Check
 Supply

44' Exhibit No. *4*
 Received in evidence
 FEB 28 1916
 In Survey for *10-70-11*
10-70-11
 Check
 Supply

374



Register No. 4

44' Exhibit No. *A*
 Received in evidence
 NOV 8 1918
noted 1073-6
 Check
 Supply

Meanders		
837° 32' E	2.11	Chains
548° 16' E	3.30	
823° 31' E	0.80	
835° 16' E	15.88	
847° 10' E	1.80	

CHANNEL



PLAT
 OF
 Amended
 U. S. SURVEY NO. 376.
 OF THE
 HOMESTEAD CLAIM
 UNDER ACT OF MARCH 3, 1908

OF
 C. F. Sheldon
 SITUATE
 About one mile N.W. from Junesville.

DISTRICT OF ALABAMA
 SCALE OF — 500 — CHS. TO INCH
 VARIATION — 81° 30' — EAST
 AREA — 47.34 — ACRES

AS
 SURVEYED BY
 C. E. DAVIDSON
 U. S. SURVEYOR
 NOV. 25-26, 1907.

The original field notes of the survey of the homestead claim of C. F. Sheldon from which this plat has been made have been examined and approved and are on file in this office and I hereby certify that they furnish such an accurate description of said claim as well, if incorporated into a plat, were fully to identify the premises, and that such reference is made therein to natural objects and permanent monuments as will perpetuate said claim to the lands thereof.

And I further certify that this is a correct plat of said claim, made in conformity with said original field notes of the survey thereof. And the same is hereby approved.

DISTRICT SURVEYOR GENERAL
 Junes, Alaska, *March 21, 1908*
H. L. ...

Plaintiff's Exhibit "E"—Application for Homestead Entry.

U. S. Land Office, Juneau, Alaska, May 2, 1908.

Notice is hereby given that Cyrus F. Sheldon, a resident of Juneau, Alaska, has applied to enter, under section 2289, Revised Statutes of the United States, and the Act of March 3, 1903, the following described tract of land, situate about one mile northwest of the town of Juneau, Alaska, on the shore of Gastineau Channel, known and designated by the U. S. Surveyor General of Alaska, an Amended U. S. Survey No. 365, and more particularly described as follows:

Beginning at corner No. 1, identical with cor. No. 1 of survey Greek Mission Cemetery, a stone marked "A. S. 375 cor. 1," whence U. S. L. M. No. 3 bears N. 62° 06' W, 0.98 chs. dist.; thence along line 1-2 of Greek Cemetery, N. 48° 03' E., 6.00 chs. to cor. No. 2, identical with cor. No. 2 of Greek Cemetery, a stone marked "A. S. 375 cor. 2"; thence north 23.16 chs. to cor. No. 3, a stone marked "A. S. 375 cor. 3"; thence West 26.45 chs. to cor. No. 4, a stone marked "A. S. 375 cor. 4"; thence south 5.48 chs. to cor. No. 5, at high water mark Gastineau Channel, not set, witness corner bears north, 78 links dist., a stone marked "A. S. 375 cor. 5 W. C."; thence from true corner along said high water mark.

- (1) S. 37° 52' E. 5.11 chs.;
- (2) S. 43° 15' E. 9.90 chs.;
- (3) S. 59° 31' E. 6.80 chs.;
- (4) S. 39° 14' E. 13.88 chs.;

(5) S. $67^{\circ} 10'$ E. 1.60 chs., to cor. No. 1, the place of beginning.

Magnetic variation at all corners $31^{\circ} 30'$ E. Area 47.34 acres.

Any and all persons claiming adversely any portion of the above-described tract of land are required to file with the [36] register and receiver of the U. S. Land Office, at Juneau, Alaska, their adverse claim there against, under oath, during the period of publication, or within thirty days thereafter, or they will be barred by the provisions of the statute.

CYRUS F. SHELDEN,

Applicant.

It is hereby ordered that the foregoing notice be published in the "Daily Alaska Dispatch," a daily newspaper printed at Juneau, Alaska, for the statutory period.

Register.

Plffs. Exhibit No. "E." Received in Evidence. Nov. 8, 1916. In Cause No. 1073-A. J. W. Bell, Clerk. By John T. Reed, Deputy. [37]

Plaintiff's Exhibit "F"—Homestead.

"Patent will contain conditions and limitations of the act of March 3, 1909, (35 Stat 844.)"

Land Office at Juneau, Alaska.

January 11, 1911.

**THIS DUPLICATE
CERTIFICATE**

Final Certificate SHOULD BE HELD Application
No. 06 UNTIL NOTICE OF No. 06
ISSUANCE OF PATENT
IS RECEIVED.

It is hereby certified that, pursuant to the provisions of Section No. 2291, Revised Statutes of the United States, Cyrus F. Sheldon has made payment in full for land embraced in U. S. plat of survey 375 amended, described as follows:

Beginning at Cor. No. 1, whence U. S. L. M. No. 3, bears N. $62^{\circ} 06'$ W. 0.98 chs., thence N. $48^{\circ} 03'$ E. 6 chs., to Cor. No. 2, thence N. 23.16 chs., to Cor. No. 3, thence W. 26.45 chs., to Cor. No. 4, thence S. 5.48 chs., to Cor. No. 5, M. C., thence meandering, (1) S. $37^{\circ} 52'$ E. 5.11 chs., (2) S. $43^{\circ} 15'$ E. 3.90 chs., (3) S. $59^{\circ} 31'$ E. 6.80 chs., (4) S. $39^{\circ} 14'$ E. 13.88 chs., (5) S. $67^{\circ} 10'$ E. 1.60 chs. to Cor. No. 1, the place of beginning, containing an area of 47.34 acres, Var. $31^{\circ} 30'$ E. being situated on the shore of Gastineau Channel.

Meridian ———, containing ———/100 acres.

Now, therefore, be it known, That on presentation of this certificate to the COMMISSIONER OF THE GENERAL LAND OFFICE, the said Cyrus F.

Sheldon shall be entitled to a patent for the tract of land above described.

C. B. WALKER,
Register.

“Patent will contain conditions and limitations of the act of March 3, 1909 (35 Stat. 844).”

Plffs. Exhibit No. “F.” Received in Evidence Nov. 8, 1916. In Cause No. 1073-A. J. W. Bell, Clerk. By John T. Reed, Deputy. [38]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1073-A.

CYRUS F. SHELDON,

Plaintiff,

vs.

GUS MESSERSCHMIDT, CHARLES QUACK-
INBUSH, and THE JUNEAU CON-
STRUCTION COMPANY,

Defendants.

Certificate and Order Settling Bill of Exceptions.

I, ROBERT W. JENNINGS, the Judge of the District Court for the District of Alaska, Division Number One, and the Judge before whom said cause was tried, do hereby certify that the above and foregoing 24 pages of typewritten matter constitute a full, true and correct transcript of all testimony and evidence introduced and heard at the trial, together with all the exhibits offered by either party to the above-entitled cause; that said bill of exceptions was

presented to me for allowance upon the date of this certificate, and I do hereby order that said bill of exceptions be and the same is hereby settled and allowed and made a part of the record in this cause.

Done in open court this 27th day of March, A. D. 1917.

ROBERT W. JENNINGS,
Judge.

Entered Court Journal No. N, page 61.

OK.—H. & H.

Filed in the District Court, District of Alaska,
First Division. Mar. 27, 1917. J. W. Bell, Clerk.
By C. Z. Denny, Deputy. [39]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1073-A.

CYRUS F. SHELDON,

Plaintiff,

vs.

GUS MESSERSCHMIDT, CHARLES QUACK-
INBUSH, and THE JUNEAU CON-
STRUCTION COMPANY,

Defendants.

Assignment of Errors.

Comes now Cyrus F. Sheldon, plaintiff in the above-entitled cause, files and presents this, his assignment of errors herein, upon which he will rely for a reversal of the judgment and decree entered against him in the District Court for Alaska:

I.

The Court erred in overruling plaintiff's demurrer to defendant's answer by order entered, August 12th, 1915.

II.

The Court erred in granting a motion of the defendants' for a nonsuit at the close of plaintiff's testimony and evidence given in said cause.

III.

The Court erred in making and entering its judgment and decree in favor of the defendants in said cause.

And for these errors and others manifest of record herein plaintiff prays for a reversal of said judgment and decree, and for a new trial of said cause.

CHENEY & ZIEGLER,

Attorneys for Appellant.

Filed in the District Court, District of Alaska,
First Division, Mar. 27, 1917. J. W. Bell, Clerk.
By C. Z. Denny, Deputy. [40]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1073-A.

CYRUS F. SHELDON,

Plaintiff,

vs.

GUS MESSERSCHMIDT, CHARLES QUACK-
INBUSH, and THE JUNEAU CON-
STRUCTION COMPANY,

Defendants.

Petition and Order Allowing Appeal.

To the Hon. ROBERT W. JENNINGS, Judge of
the Above-entitled Court:

Cyrus F. Sheldon, plaintiff in the above-entitled cause, conceiving himself aggrieved by the judgment and decree of the above-entitled Court made and entered on the 7th day of February, 1917, does hereby appeal from said judgment and decree to the United States Circuit Court of Appeals, for the Ninth Circuit, and prays for an order transmitting a transcript of the record upon which said judgment and decree was made and based to the said Circuit Court of Appeals for the Ninth Circuit, to the end that the record and proceedings may be examined and said judgment and decree reversed or modified and speedy justice done in the premises.

This petition is made upon the assignment of errors filed herein and upon all the records and files in said cause.

CHENEY & ZIEGLER,

Attorneys for Plaintiff.

And now on this 27th day of March, 1917, it is ordered that the foregoing petition for appeal be and the same is hereby allowed.

Done in open court this 27th day of March, 1917.

ROBERT A. JENNINGS,

Judge.

Entered Court Journal No. N, Page 61-62. [41]

Filed in the District Court, District of Alaska,
First Division. Mar. 27, 1917. J. W. Bell, Clerk.
By C. Z. Denny, Deputy. [42]

*In the District Court for the District of Alaska,
Division Number One, for Juneau.*

No. 1073-A.

CYRUS F. SHELDON,

Plaintiff,

vs.

GUS MESSERSCHMIDT, CHARLES QUACK-
INBUSH, and THE JUNEAU CON-
STRUCTION COMPANY,

Defendants.

Citation on Appeal

The President of the United States of America to
Gus Messerschmidt, Charles Quackinbush, and
The Juneau Construction Company, Defend-
ants:

You and each of you are hereby cited and admon-
ished to be and appear in the United States Circuit
Court of Appeals for the Ninth Circuit to be holden
at San Francisco, in the State of California, within
thirty days from this date pursuant to an appeal filed
in the Clerk's office of the United States District
Court for the Territory of Alaska, Division Number
One, at Juneau, in a cause wherein Cyrus F. Sheldon
is plaintiff and you are the defendants to show cause
if any there be why the judgment and decree in said
appeal mentioned should not be corrected and speedy
justice done to the parties in that behalf.

WITNESS, the Hon. EDWARD DOUGLASS
WHITE, Chief Justice of the Supreme Court of the
United States, and the Seal of the District Court for

Alaska, Division Number One, this the 27th day of March, 1917.

ROBERT W. JENNINGS,
Judge.

[Seal]

Attest: J. W. BELL,
Clerk.

Service of the above and foregoing citation on appeal is admitted this 27th day of March, 1917.

HELLENTHAL & HELLENTHAL,
Attorneys for Defendants. [43]

Filed in the District Court, District of Alaska,
First Division. Mar. 29, 1917. J. W. Bell, Clerk.
By C. Z. Denny, Deputy. [44]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1073-A.

CYRUS F. SHELDON,

Plaintiff,

vs.

GUS MESSERSCHMIDT, CHARLES QUACK-
INBUSH, and THE JUNEAU CON-
STRUCTION COMPANY,

Defendants.

Order Fixing Bond.

The Court having heretofore allowed the petition of plaintiff for an appeal, it is ordered that the appeal bond be, and the same is hereby fixed at five hundred (\$500) dollars.

ROBERT W. JENNINGS,
Judge.

Dated March 27, 1917.

Entered Court Journal No. N, Page 62.

Filed in the District Court, District of Alaska,
First Division. Mar. 27, 1917. J. W. Bell, Clerk.
By C. Z. Denny, Deputy. [45]

*In the District Court for the District of Alaska,
Division Number One, at Juneau.*

No. 1073-A.

CYRUS F. SHELDON,

Plaintiff,

vs.

GUS MESSERSCHMIDT, CHARLES QUACK-
INBUSH, and THE JUNEAU CON-
STRUCTION COMPANY,

Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That I, Cyrus F. Sheldon as principal, and George
Miller as surety, are held and firmly bound unto Gus
Messerschmidt, Charles Quackinbush, and The Ju-
neau Construction Company, in the penal sum of
five hundred (\$500) dollars, to the payment of
which well and truly to be made we hereby bind our-
selves, and each of our heirs, executors and admin-
istrators, jointly and severally, firmly by these pre-
sents.

The condition of the above obligation is such, that
whereas the above-named defendants recovered a
judgment against the plaintiff in the above-entitled
cause, that the plaintiff take nothing by his action

and that the defendants recover of the plaintiff the costs herein expended; and whereas the above-bounden Cyrus F. Sheldon, has appealed to the United States Circuit Court of Appeals for the Ninth Circuit to reverse said judgment.

NOW, THEREFORE, if the above-named Cyrus F. Sheldon, as appellant, shall prosecute said appeal to effect and if he fails to make good his plea, shall answer all costs and damages adjudged against him, then this obligation shall be null and void, otherwise [46] to remain in full force and effect.

WITNESS our hands and seals this 28th day of March, 1917.

C. F. SHELDON,
Principal.
GEORGE MILLER,
Surety.

United States of America,
Territory of Alaska,—ss.

This is to certify that on this 28th day of March, 1917, before me, a notary public within and for the Territory of Alaska, personally appeared Cyrus F. Sheldon and George Miller, to me known to be the persons who executed the above and foregoing instrument, and each acknowledged that he executed the same freely and voluntarily for the uses and purposes herein expressed.

[Notarial Seal]

A. H. ZIEGLER,
Notary Public for Alaska.

My commission expires July 3d, 1917.

The foregoing bond is approved this 29th day of March, 1917.

ROBERT W. JENNINGS,
Judge.

OK.—S. HELLENTHAL.

[Endorsed]: No. 1073-A. Cyrus F. Sheldon vs. Gus Messerschmidt et al. Filed in the District Court, District of Alaska, First Division. Mar. 29, 1917. J. W. Bell, Clerk. By John T. Reed, Deputy. [47]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1073-A.

CYRUS F. SHELDON,

Plaintiff,

vs.

GUS. MESSERSCHMIDT, CHARLES QUACKENBUSH, and THE JUNEAU CONSTRUCTION COMPANY,

Defendants.

Affidavit of Cyrus F. Sheldon of Value of Subject Matter in Controversy.

Cyrus F. Sheldon, being first duly sworn on oath, deposes and says:

I am the plaintiff in the above-entitled cause; that the value of the subject matter in controversy in said cause exceeds *exceeds* the sum of Five Hundred (\$500) Dollars.

C. F. SHELDON.

Subscribed and sworn to before me this 26 day of March, 1917.

[Seal]

A. H. ZIEGLER,

Notary Public for Alaska.

My commission expires July 3d, 1917.

Filed in the District Court, District of Alaska,
First Division. Mar. 26, 1917. J. W. Bell, Clerk.
By C. Z. Denny, Deputy. [48]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1073-A.

CYRUS F. SHELDON,

vs.

GUS. MESSERSCHMIDT, CHARLES QUACK-
ENBUSH, and THE JUNEAU CON-
STRUCTION COMPANY,

Defendants.

**Order Transmitting Plaintiff's Original Exhibit
"D."**

Upon oral motion of plaintiff, it appearing that Plaintiff's Exhibit "D," in the above-entitled cause is a patent plat being U. S. Survey No. 375; and,

It further appearing that it is necessary that said Exhibit "D" be made a part of the bill of exceptions in this cause on appeal,—

NOW, THEREFORE, it is hereby ordered that the clerk of this court be and he hereby is authorized and instructed to attach said original exhibit "D" to a certified copy of this order, and to include

said certified copy of this order together with said exhibit "D," attached hereto in the bill of exceptions in this cause in order that said exhibit may be withdrawn from the files of this court and transmitted to the Circuit Court of Appeals.

Done in open court this 26th day of March, A. D. 1917.

ROBERT W. JENNINGS,
Judge.

Entered Court Journal No. N, Page 60.

OK.—H. & H.

Filed in the District Court, District of Alaska,
First Division Mar. 26, 1917. J. W. Bell, Clerk.
By C. Z. Denny, Deputy. [49]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1073-A.

CYRUS F. SHELDON,
Plaintiff,

vs.

GUS. MESSERSCHMIDT, CHARLES QUACK-
ENBUSH, and THE JUNEAU CON-
STRUCTION COMPANY,

Defendants.

Appellant's Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

Please prepare a transcript of the record in the above-entitled cause, to be filed in the office of the clerk of the United States Circuit Court of Appeals

for the Ninth Circuit, at San Francisco, and include in said transcript the following proceedings, pleadings and papers, on file in your office:

1. Amended Complaint.
2. Answer to Amended Complaint.
3. Demurrer to Defendant's Answer.
4. Order Overruling Demurrer to Defendant's Answer, Dated August 12th, 1915.
5. Reply.
6. Judgment.
7. Bill of Exceptions.
8. Assignment of Errors.
9. Petition for Appeal and Order Allowing same.
10. Citation on appeal.
11. Order Fixing Bond.
12. Bond on Appeal.
13. Affidavit of Cyrus F. Sheldon.
14. Order Transmitting Original Exhibit "D."
15. This Praecipe.

Dated at Juneau, Alaska, March 29th, 1917.

CHENEY & ZIEGLER,
Attorneys for Appellant [50]

Filed in the District Court, District of Alaska,
First Division. Mar. 29, 1917. J. W. Bell, Clerk.
By C. Z. Denny, Deputy. [51]

In the District Court for the District of Alaska, Division Number One, at Juneau.

No. 1073-A.

CYRUS F. SHELDON,

Plaintiff,

vs.

GUS. MESSERSCHMIDT, CHARLES QUACK-
ENBUSH, and THE JUNEAU CON-
STRUCTION COMPANY,

Defendants.

**Certificate of the Clerk of the District Court to
Transcript of Record.**

United States of America,
Territory of Alaska,—ss.

I, J. W. Bell, clerk of the District Court for the District of Alaska, Division Number One, do hereby certify that the foregoing and hereto attached ——— pages of typewritten matter numbered from 1 to ——— both inclusive, constitute a full, true, and complete copy, and the whole thereof, prepared in accordance with the praecipe of the plaintiff and appellant on file herein and made a part hereof, in the cause wherein Cyrus F. Sheldon is plaintiff and Gus Messerschmidt, Charles Quackenbush, and The Juneau Construction Company are defendants, No. 1073-A, as the same appears of record and on file in my office, and that the said record is by virtue of an order allowing appeal, and Citation issued in

this cause and the return thereof in accordance therewith.

I do further certify that this transcript was prepared by me in my office, and the cost of preparation, examination, and certificate, amounting to \$23.45, has been paid to me by counsel for plaintiff.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled Court this 31st day of March, 1917.

[Seal]

J. W. BELL,

Clerk.

By _____,

Deputy.

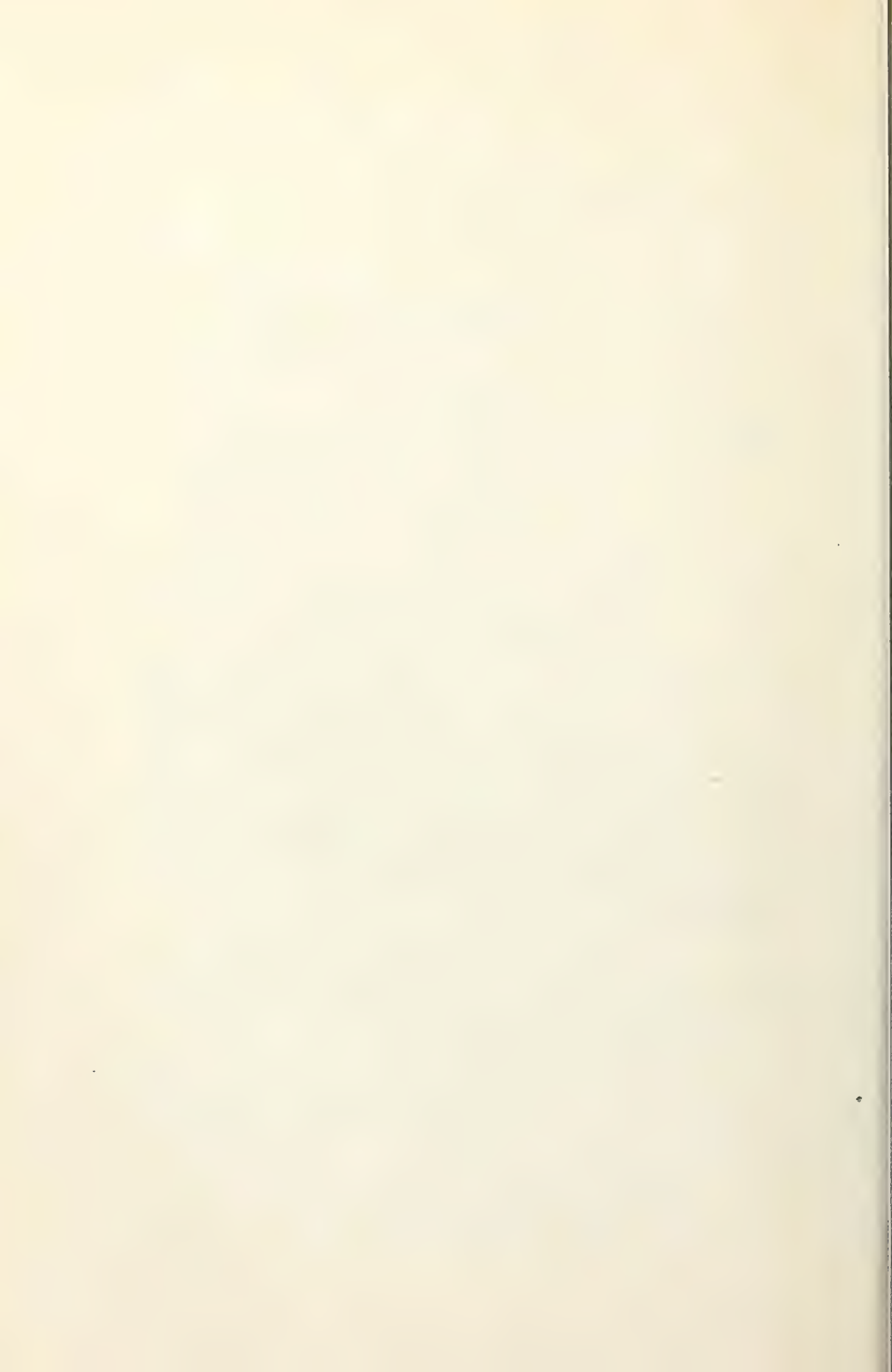
[Endorsed]: No. 2973. United States Circuit Court of Appeals for the Ninth Circuit. Cyrus F. Sheldon, Appellant, vs. Gus. Messerschmidt, Charles Quackenbush, and The Juneau Construction Company, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

Filed April 11, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.



United States
Circuit Court of Appeals
For the Ninth Circuit

CYRUS F. SHELDON,
Appellant,
VS.
GUS MESSERSCHMIDT, CHARLES
QUACKENBUSH, and THE JUNEAU
CONSTRUCTION COMPANY,
Appellees.

UPON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF ALASKA, DIVISION NO. 1.

Brief of Appellant

CHENEY & ZEIGLER,
Attorneys for Appellant.



No. 2973.

United States
Circuit Court of Appeals
For the Ninth Circuit

CYRUS F. SHELDON,

Appellant,

vs.

GUS MESSERSCHMIDT, CHARLES
QUACKENBUSH, and THE JUNEAU
CONSTRUCTION COMPANY,

Appellees.

UPON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF ALASKA, DIVISION NO. 1.

Brief of Appellant

CHENEY & ZEIGLER,
Attorneys for Appellant.



STATEMENT OF CASE

At the time of the commencement of this action, the appellant was, and had been for more than seventeen years prior thereto, the owner, by right of continuous possession and occupation and by virtue of Final Certificate No. 06, dated January 11, 1911, issued by the Register of the United States Land Office, at Juneau, Alaska, of a homestead claim within the Juneau, Alaska, Land District, consisting of 47.34 acres of land. The said homestead was situated about one mile Northwest from the City of Juneau, on Gastineau Channel, and extended along, and abutted upon, the meander line at mean high tide of said Gastineau Channel. The homestead of the appellant abuts for a distance of two thousand feet upon, and is bounded by, the waters of Gastineau Channel, an arm of the Pacific Ocean, navigable for vessels of all sizes, and in which the tide ebbs and flows.

The appellees on December 29, 1913, while the appellant was so possessed of the homestead, entered upon the tidelands immediately in front of, and abutting upon, said homestead and took possession of two strips of tidelands, amounting to approximately 106 and 70 feet in length, respectively. They proceeded to drive piles, cap the same and to place improvements thereon, the said im-

provements joining the waterfront boundary of appellant's homestead.

Appellant claims that, by virtue of his homestead claim, for which he holds a final certificate, he is entitled to the use and occupancy of the said tidelands lying in front of his property, and that the obstructions placed on the tidelands in front of his homestead deprive him of the free and unobstructed use and occupancy of the tidelands upon which the structures were placed.

The suit was instituted to have the court decree that appellant was entitled to the free use and occupancy of said tidelands and entitled to exercise riparian and littoral rights over the same. Appellant also asked for an injunction restraining the appellees from permitting the obstructions to remain on the tidelands, from further placing obstructions on said tidelands, or in any manner interfering with appellant's right in the free use and occupancy of said tidelands.

A trial was had, and upon the close of the evidence produced by appellant a non-suit was granted upon motion of counsel for the appellees. Appellant brings this appeal and assigns as error:

I.

The overruling of appellant's demurrer to appellees' answer.

II.

The granting of appellees' motion for a non-

suit at the close of appellant's evidence given in said cause.

III.

Rendering its judgment and decree in favor of the appellees.

ARGUMENT

In order to place appellant's contention plainly and squarely before the court, appellant says that he claims the exclusive right to have the free and unobstructed use of all of the tideland immediately in front of and abutting his upland against all the world except the superior proprietor (which is the United States, as trustee for the future State), and, until the tideland is taken by the superior proprietor for public use, no private person can claim that right for his use as against the appellant.

Pursuant to Congressional action in 1912, the laws of Alaska were compiled, codified, arranged and annotated. At this time it was considered by the lawyers who compiled the laws that

“The title and domain of the tide-waters and the lands underneath, and the beds and banks of navigable streams in Alaska are held by the United States in trust for the future states to be erected there.”

“A homestead entry perfected under the United States land laws, where the land abuts upon the waters of a navigable

stream, gives to the qualified entryman the exclusive right to the use and occupation of the shore land between high and low water mark as against the mere trespasser."

See note to Compiled Laws of Alaska,
Sec. 55.

U. S. v. Roth, 2 Alaska, 257; Itid. p. 416;

Gavagan v. Crary, 2 Alaska, 370;

~~Heine~~ *v. Pacific Coast Co.*, 160 Fed. 794.

McCloskey

In view of the foregoing, it would seem that at this time (1912) it was generally conceded and recognized that the upland owner in Alaska had the exclusive right to the use and occupation of the shore land. As will be shown hereafter, this doctrine has remained unchanged.

The first case in Alaska in which the question of the right of possession of the tideland was involved and in which there was a direct adjudication by the courts of Alaska, is that of *Lewis v. Johnson*, 76 Fed. 477.

This case was tried at Juneau in 1896. Plaintiff brought suit against defendant alleging that he was the owner by claim, possession and occupation of a lot in Juneau abutting upon the waters of Gastineau Channel, an arm of the Pacific Ocean, and that defendant had commenced the erection of certain structures on the abutting tideland in front of his lot which, if completed, would destroy or impair the littoral rights of plaintiff incident

to said lot of ground, and prayed for injunctive relief.

Defendant contended, upon demurrer,

“1. That the upland owner, even in fee simple, has no rights in abutting tidelands by virtue of such ownership; 2. That, granting such rights to exist as incident to ownership in fee, the plaintiffs have no such title to the uplands described in the bill as will vest them with any littoral or riparian rights; and, 3. That the proper remedy is at law and equity ought not to interfere.”

District Judge Delaney commenced his decision with the following sentence:

“The court feels obliged to dissent from all of these propositions.”

In further deciding these points, the court used the following language, at page 479:

“On the contrary, in furtherance of the general policy of the government and within the purview of the act providing a civil government for Alaska (23 Stat. 24, paragraph 8, Sppl. Rev. Stat. 433) and the act of March 3, 1891 (26 Stat. 1095, paragraph 12, Suppl. Rev. Stat. 944), the court will maintain and enforce in behalf of the bona fide settler in actual possession of lands in Alaska all the rights appurtenant or incident to such lands which a title in fee would vest in

him, saving only the paramount rights of the United States as the sovereign owner of the soil; included within these rights of the settler who holds lands abutting on tidewater is the right of access over and across fronting tidelands to deep water, as now determined by the highest courts of England and this country. The right certainly brings with it the remedy, and where the law side of the court affords no plain, speedy and adequate remedy, as in the case of the erection of structures which impair or destroy this right of access, equity will interfere."

The above case holds that the upland owner, through an injunction, may prevent the placing of structures on the tideland in front of his holding which *impair or destroy* his right of access. The case does not show, and, by inference it would seem by the language used, "impair or destroy," that it is unnecessary to show, that the obstructions would completely cut off the right of access.

The next case directly on this point is

U. S. v. Roth, 2 Alaska, 257

decided in 1904, at Fairbanks.

This was an action for trespass under Section 67, Penal Code of Alaska. Defendant Roth erected a tent on and occupied a portion of the ground upon that part of the land between high and low water immediately in front of the homestead of C. H.

Heine. These facts were admitted, but defendant offered as a defense the fact that land lying between high and low water in front of a homestead is no part thereof and is not in possession of the homesteader.

The court held that defendant was a trespasser and used the following language, at page 264:

“Upon the facts and authorities, I find that by reason of his lawful occupation and possession of his homestead, including the whole of Garden Island, the claimant was in lawful occupation and possession of all the shore lands along its meandered line; that such shore land is a valuable property to which he has an inchoate but exclusive right of possession as against all the world except the sovereign proprietor—the government of the United States as trustee for the future state—that the defendant was and is a trespasser on such shore land and under the stipulated facts is guilty of trespassing on lands or premises in the lawful occupation of another.”

Had this case been appealed to the Circuit Court, it would have been most fortunate for many people within the Territory who are situated as is the appellant in this case, because the question would have been adjudicated once for all times.

Since the decision of the *Roth* case, *supra*, the question of littoral rights has been before the

courts in a number of different phases, but we respectfully contend that in none of such cases have the facts been such so as to make it necessary to decide the exact question that appellant now raises.

The last case from our Circuit Court of Appeals,

Worthen Lumber Mills v. Alaska Juneau Gold Mining Co., 229 Fed. 966,

simply held that the plaintiff was entitled to an injunction to prevent the defendant from placing structures on the tideland in front of plaintiff's mill sites which cut off plaintiff's right of ingress and egress to and from said land.

"The court below found that the appellee had need of access to the navigable waters of Gastineau Channel in connection with its mining plant on the upland, and that to avail itself of this right of access it was necessary to construct a wharf covering the whole space in front of the upland or from the appellee's southerly line to the present Alaska Juneau wharf, and that all of said area is reasonable and necessary to be used in aid of the appellee's ingress and egress to and from such upland. The appellee having, as we have found, the right of access to the navigable waters of the channel, we are not convinced that the court below has by its decree accorded to it a greater or

more extensive right than is reasonable under the circumstances."

Had not the appellee in the above case actually proven that it needed the tideland for the purposes above mentioned, we feel, nevertheless, that the decision of the Circuit Court would have been just the same, for the reason that the structures, as held by the lower court, obstructed the appellee's right of ingress and egress.

The above case is decided, it seems, not so much on the theory that appellee's right of egress from and ingress to its upland would actually be cut off, as that appellee, by virtue of its ownership of upland, was entitled to construct a wharf on the tideland for the purpose, it is true, of receiving freight from ships to be used in its plant, and also for the purpose of storing its freight prior to its being used in the construction and operation of the appellee's mills. So it appears, not only in this case, but in others, that the necessity and reasonableness of the use of the right of egress and ingress is not always the controlling feature. The courts are ready and willing to recognize the doctrine that the upland owner is not to be limited to a strict interpretation of the term "right of egress and ingress."

On the other hand, the equitable doctrine is that the upland owner is deemed to have the first and best right to the tidelands, to use them in con-

nection with the upland in any manner incident and appurtenant.

We realize that the appellees in the case at bar will confront us with the proposition that, unless it is shown the upland owner has an immediate need of the right of access, he has no ground for injunctive relief. But we respectfully submit that in none of the cases involving littoral rights in Alaska has this doctrine ever been established by our courts. As stated before herein, the cases have been decided on other grounds. Some, like the case of

Barron v. Alexander, 206 Fed. 272

wherein it was held,

“That the owner of a tract of land in Alaska fronting on Chatham Strait, at a point where it is twelve miles wide, held not entitled to an injunction to restrain another from constructing and maintaining a fish trap in the navigable waters in front of said land, shown not to prevent or interfere with his access to the waters of the Strait.”

The evidence in the *Barron* case, *supra*, actually showed that the fish trap in question was below the line of low tide and was not on the tideland at all.

Certainly, then, the *Barron* case can be no authority in the case at bar, where it is shown

the structures are on the tideland and, in fact, are partly over the upland. (See evidence of Crowther, Tr. pp. 18, 19):

“Q. What did you find in reference to those structures placed there by the defendants as being in conflict with any of those lines—lines of ordinary high water?

A. The improvements which were pointed out to me by Mr. Sheldon as having been placed there by Mr. Messerschmidt and others were partly on the upland of the Sheldon Homestead and partly on the tidelands abutting the homestead. In other words, a portion of the structure was above the line of ordinary high water and a portion of it was below.

Q. The obstruction you found placed there on the tidelands abutting the upland of the Sheldon Survey No. 375 is an obstruction, isn't it, between the upland and the tidelands or deep water?

A. It is right along the line. The structures placed there in the manner I have already stated are partly on the tidelands and partly on the upland and they cover a portion of the meander line of the frontage of that survey and they consist of piling, capping and platforms.”

Also, Tr. p. 26, evidence of Sheldon:

“Q. What is the nature of that obstruction?

A. There is another foundation about 70 feet frontage on the land there, partly above the mean high tide and partly below it, and that consists of posts and caps and floor joists, and they made a little flooring there but it isn't floored over.

Q. Does that constitute an obstruction?

A. It does.”

We have reviewed all the cases arising in Alaska wherein the littoral right was involved, and it appears that the right to an injunction has never been denied where it was shown that the structures would destroy or impair the right of access to deep water. It has not been necessary to show that it cuts off all access.

It is a well established fact and must be admitted that in Alaska the title to the tideland is held in trust by the United States for the future States that may hereafter be created, nevertheless the said tideland is burdened with an easement in favor of the upland owner.

That easement is the right to occupy and use all the tideland included between two lines drawn from the end boundaries of the upland to deep water, used for the purposes of ingress and egress.

This is true, not because of any fixed rule so much as on account of the fact that the easement is incident to the land and runs with the land.

As before stated, this case does not merely involve the question of right of ingress or egress to or from said upland from the navigable waters *at any particular place or point*. And if the upland owner in fee (or, as in this case, with a title equal to a fee) has the right of egress from and ingress to his upland, he has it throughout its entire length abutting and lying on ordinary high tide mark of the shore, and certainly no court can say, nor ever has said, to the upland owner: "While you own all of the upland, you can only go to and come from the navigable waters opposite your upland at certain points or places which the court will fix (and the court will give you only so much of the strip from the tideland for that purpose, and the court will tell you where you should go to and come from the navigable waters to your upland; the remainder of the tideland abutting your upland the court will give to some other person."

To do this would be legislating under the guise of judicial decision, since the undisputed fact is that the tideland really belongs to the people of the future State to be created out of the Territory of Alaska, and the United States cannot, nor can courts, dispose of the tidelands ar-

bitrarily, nor at all, excepting for the public good and then only "upon due compensation" to the upland owner.

Yates v. Milwaukee, 77 U. S. 497

The trial court in the case at bar held the appellant had not made a case for one or all of the following three reasons: (1) Plaintiff did not show the structures placed upon the tideland interfered with plaintiff's right of ingress and egress; (2) That plaintiff's right of ingress and egress is dependent upon a necessity for use; and (3) That the structures would facilitate plaintiff's right of ingress and egress. (See defendant's motion for non-suit, Tr. p. 30).

We think it sufficient to state that the first and third reasons, under the undisputed evidence, could not have been the grounds upon which the non-suit was granted, and that the court held that, inasmuch as appellant had not shown any necessity for the use of the tideland, he could not be granted an injunction.

The undisputed evidence clearly shows that the structures placed on the tideland would actually interfere with appellant's right of ingress and egress. The undisputed evidence also shows that the structures would not facilitate egress and ingress from and to the upland. Therefore, it must be admitted that the reason the non-suit was grant-

ed by the court was based upon the fact that the appellant had failed to show a necessity of use of the right of egress and ingress.

If appellant's right to relief is dependent upon the necessity of use, then surely it is legislation by judicial interpretation, as stated before.

If this is to be the law laid down and applied in Alaska, then the two thousand feet of tideland in front of appellant's homestead can be entered and occupied by squatters, who can erect small cabins which are of no use but for living purposes. Appellant, in the absence of any present and immediate use, must fold his hands and tacitly consent to the taking away of his right of ingress and egress, which he and every settler on the upland has been led to believe could not be taken by anyone save the Government or for a public use, and then only by due compensation.

If that is the law, then after the entire shore land has been squatted upon and occupied, should the appellant desire to exercise the right of ingress and egress in such a manner that it would require the entire tideland (and it must be conceded that there are a number of industries which would require same), appellant would be obliged to proceed in the proper manner to have the tideland vacated. Should he not need the right for a number of years after the occupation of the tideland, when he did have the use and proceeded to

have vacated the tideland, might not he then be met with the doctrine in

Dalton, et al., v. Katalla Co., et al., 4 Alaska, 411,

where it is held as follows:

“Where an owner of upland bordering on navigable waters in Alaska stands by and permits a railroad company to build its approaches, piers and wharves on tidelands in front of his upland without protest and under an act of Congress authorizing it, he is estopped from having a mandatory injunction requiring the railroad company to remove them. * * *”

The reason why appellant should not be forced into this position is also aptly stated in the case of

West Coast Improvement Co. v. Windsor, 36 Pac. 441.

“No trespasser should be allowed to occupy or in any manner interfere with the possession of the upland owner of the tidelands on his front until such time as he could exercise his right to purchase the same from the state.”

saying, among other things:

“If the courts should hold that the upland owner had no right to prevent one having no claim whatever from squatting upon tidelands in his front, *we should have such a state of facts existing as would tend*

*greatly to the prejudice of the public interests. * * * * .*"

(italics ours.)

We think, and respectfully urge, then, that the right to this easement should be recognized, and that where it is shown, as in this case, the structure actually interfere with the free and unobstructed use of the upland, the right should be protected by injunction.

The structures in the case at bar actually interfere with this use. (See evidence of Crowther, Tr. p. 20) :

"Q. Now, the nature and character of the obstruction you refer to, would they prevent ready ingress and egress from the upland to the navigable water?

A. Well, it tends to form an obstruction to ingress and egress. I had to duck my head to get underneath it. A shorter man might not have any trouble.

Q. The piling as it stands there, wouldn't that be an absolute obstruction there and cut off ingress and egress from and to the navigable water?

A. It certainly would have that tendency."

See evidence of Sheldon, Tr. p. 25:

"Q. What is the nature of that structure? Describe it.

A. Well, it is posts and caps and then floor joists on the caps and floored over; platform.

Q. I will ask you whether or not that constitutes and is an obstruction.

A. It surely is.

Q. In what manner would it be an obstruction to you in the enjoyment of your upland in case you desire to reach deep water at low tide?

A. I think it would absolutely cut me off because if they had a right to the possession of it they would undoubtedly keep me off as a trespasser."

Also, evidence of Sheldon, Tr. p. 26:

"Q. Does that constitute an obstruction?

A. It does.

Q. Preventing you from the enjoyment of your land if you desire to reach deep water at low tide?

A. It does."

See, also, evidence of Miller, Tr. p. 29:

"Q. Now, describe to the court what those structures are.

A. Piles and joists and some of them is floored.

Q. Now, I will ask you the character of those structures you saw there, whether they are an obstruction to the up-

land owner if he desires to get out to deep water at low tide—that part covered by these structures.

A. He wouldn't need them if it didn't get too low tide.

Q. At high tide can you get down there?

A. No, you cannot.

Q. Isn't it a fact that these structures would be an obstruction to the use and enjoyment of the uplands by the upland owner if he wanted to get down to deep water from that strip of ground?

A. Yes, it would be an obstruction.

Q. Now, that holds good with all the obstructions placed there by the defendants, don't it?

A. Yes."

This was held to be the law in the case of

Dalton v. Hazlett, 182 Fed. 561

"Where a homestead entry in Alaska was bordered on one side by the meanders of the tide water of Orca Inlet, the entryman, as owner of the upland, though acquiring no title to the shore or soil below high water mark, was entitled to *free and unobstructed access* to the navigable waters, and for that purpose to construct a wharf over such lands without interfer-

ence by third persons claiming the right to use the shore." (Italics ours.)

It has been urged, however, that if the upland owner has the exclusive right by way of easement over the tideland, he could and possibly might stand by and prohibit the use of valuable sites for docks, wharves, piers, etc.

This is answered by the fact that if the upland owner has no personal use of the tideland, he would do just as other prudent business men—provide for the use of same in the same manner that he would of his upland—either rent or sell his right to the use.

Should this point be settled in this manner, surely it would make these rights much more stable than at present, for the reason that a person desiring to occupy the tideland of the upland owner could secure that right by contract from the upland owner and would be in a position where he could not be removed at any time the upland owner desired to use the tideland where such person might have entered and taken possession.

The right to convey the upland owner's right of egress and ingress was referred to in the case of

Decker v. Pacific S. S. Co., 164 Fed. 974

where it is held that the littoral owner can convey his right of access to the navigable waters in front of his premises.

The right to convey the upland owner's right to the tideland was recognized and established in the case of

Miller v. Mendenhall, 19 Am. St. Rep. 219,
221

"Thereafter the improvement company caused this land, together with the land in front thereof under water, out to the dock line to be surveyed and platted into lots and blocks, piers, slips, avenues, and streets, and caused a plat thereof to be duly made and recorded, under the name of the Bay Front Division of Duluth, and thereafter proceeded to convey divers lots and parcels of the platted land, as well land under water as the dry land, to divers persons, by reference to the recorded plat, and by conveyances of the form set out in the complaint, and containing special covenants and stipulations, as hereinafter mentioned."

The reason why the right of the upland owner to the tideland should be established in the manner indicated is more clearly set forth in *Ensminger v. The People, ex rel*, 47 Ill. 384

"There is nothing which tends more largely to harmony of society and the prosperity of communities than certainty and stability of rules by which human acts are to be measured."

When, in connection with what we have just stated, it is considered that the states invariably give to the upland owner the first right to purchase the tideland in front of his holding, it gives additional reason why the upland owner should be protected in his easement of ingress and egress. If the upland owner were not now protected, when Alaska shall have been made a State and the State says to the appellant: "You own the upland, and by virtue of your ownership we extend to you the first right to purchase the two thousand feet of tideland in front of your property," appellant will be in the position where if he purchases he will have to expend great sums in order to gain possession of the tideland, for surely the State itself will not cause the tideland to be vacated. It might be necessary to bring an unlimited number of suits because, under our law, defendants in ejectment holding different areas cannot be joined. Appellant might be too poor to do so. If so, or through many other possible reasons, he cannot for a long time gain possession of the tideland, his upland concededly is of less value.

That the policy of the law is to accord to the upland owner the first right to purchase the tideland is clearly established by the case of

Shiveley v. Bowlby, et al., 152 U. S., 38 L. Ed. 350.

"The defendants in error claimed title

to the lands in controversy by deeds executed in behalf of the State of Oregon by a board of commissioners, pursuant to a statute of the state of 1872, as amended by a statute of 1874, which recited that the natural encroachments of the sea upon the land, washing away the shores and shoaling harbors, could be prevented only at great expense by occupying and placing improvements upon the tide and overflow lands belonging to the state, and that it was desirable to offer facilities and encouragement to the owners of the soil abutting on such harbors to make such improvements and therefore enacted that the owner of any land abutting or fronting upon or bounded by the shore of any tide-waters should have the right to purchase the lands belonging to the state in front thereof, and that if he should not do so within three years from the date of the act, they should be open to purchase by any other person who was a citizen and resident of Oregon, after giving notice and opportunity to the owner of the adjoining upland to purchase, and making provisions for securing to persons who had actually made improvements upon tide-lands a priority of right so to purchase them."

Also, Laws of Oregon, 1891, p. 594, Sec. 1:

"That the owner or owners of any land abutting or fronting upon or bounded by

the shore of the Pacific Ocean, or of any bay, harbor or inlet (on the east coast of this state) of the same, and rivers and their bays in which the tide ebbs and flows, within this state, shall have the right to purchase from the state all the tidelands belonging to the state in front of the lands so owned; Provided, that if valuable improvements have been made upon any of the tidelands of this state before the title to the land on the shore shall have passed from the United States, the owner of such improvements shall have the exclusive right to purchase the land so improved extending to low water mark, for the period of three years from the approval of the act to which this is amendatory. * * * .”

The language of this statute clearly indicates that in Oregon in the event the tideland is covered with either wharves or dwelling houses, the owners thereof are given the first right to purchase, providing the improvements were placed upon the tideland before the title to the upland should have passed from the United States. It is readily seen, therefore, that the State of Oregon recognizes in the upland owner when he became such the exclusive right to become the ultimate possessor and owner of the tideland abutting his upland.

The language used by Judge Delaney, in *Lewis, et al., v. Johnson*, 76 Fed. 476, 477, 478, seems at this point to be forcibly applicable.

“After a mature consideration of the subject, the court is not prepared to hold that a bona fide claimant in actual possession and occupation of a lot of ground on the public lands which abuts on the tide water does not take all the littoral or riparian rights of the owner in fee. Reason and equity are on the other side of the question. For a long period of years the federal government has not only conceded to American citizens the right to enter upon, possess and improve public lands, but it has encouraged them so to do by reserving to the bona fide settler the first right to a patent to the land so possessed and improved by him. This policy has obtained in both the legislative and executive branches of the government and has met the approval of the court. * * *

It therefore partakes of the nature of a guaranty on the part of the United States that the actual settler and bona fide occupant, within reasonable limits, may perfect his title in fee against all comers whenever the lands are opened by Congress for entry at the land offices. Lands are valuable only for the uses that may be made of them. They may be valuable for residential purposes, for the erection of business blocks, as sites for manufacturing plants, for the water powers afforded by the streams running through them, for the timber growing thereon, for

parks and places of summer resort or
 recreative doings, for agricultural and
 grazing purposes, *and for the littoral and
 riparian privileges appurtenant or inci-
 dent to them.* The proposition that the
 courts are not open to the owner in fee
 for the preservation of any of the rights
 incident to land and property above men-
 tioned would be dismissed by every court
 in the civilized world without the grace
 of a moment's consideration. What ten-
 able ground is there from which to as-
 sert that the bona fide settler on and in
 actual possession of a piece of public land
 has not an equal right in the forum of
 the court, and if he may maintain any one
 of the rights incident to ownership in fee,
 why not all? The soil is his against all
 the world except the United States. The
 neighbor of the owner in fee may not con-
 vert the front yard of the latter's resi-
 dence into a cesspool, nor flood his busi-
 ness house with water, nor undermine the
 foundation of his manufacturing estab-
 lishment, nor divert the water falling
 through his land so as to destroy the wa-
 ter power it affords, nor cut his growing
 timber, nor convert his park into a stock-
 yard, * * * *nor cut off his access to
 deep water over abutting tidelands.* Can
 it be said that the law affords the owner
 in fee remedies against all these things,
 but the bona fide settler on and in actual

possession of public lands upon which he may have passed the best years of his life in honest labor to improve and beautify, must sit by and see his lot of ground permanently injured or destroyed because the law gives him no remedy for want of letters patent which he may certainly obtain whenever Congress opens the lands for purchase? If the courts must fold their hands while the settler on public lands is being thus deprived of all that is valuable in the land that he occupies the liberal policy the government has extended to him will be defeated and when the time comes that he may acquire his title, patent may bring to him but a barren estate, stripped of all that may give it value. The court cannot persuade itself that this is the law. On the contrary, in pursuance of the general policy of the government and within the purview of the act providing for a civil government for Alaska and the Act of March 3, 1891, the court will maintain and enforce in behalf of the bona fide settler in actual possession of lands in Alaska all the rights appurtenant or incident to such lands which a title in fee would vest in him, saving only the paramount rights of the United States as the sovereign owner of the soil. Included within these rights of the settler who holds lands abutting on tide water is the right of access over and across front-

ing tidelands to deep water, as now determined by the highest courts of England and this country. The right certainly brings with it the remedy and where the law side of the court affords no plain, speedy and adequate remedy, as in the case of erection of structures which *impair or destroy* this right of access, equity will interfere." (Italics ours.)

The upland owner's right to deal with the tideland as his private property was recognized in

Shiveley v. Bowlby, et al., supra,

"But in consideration of the fact that prior to 1872, as it would seem, these lands had been dealt with as private property and sometimes improved by expensive structures, the acts further provided in such cases that where the bank owner had actually sold the tidelands, when the purchasers of the tidelands from the bank owner, or a previous bank owner, should have the right to purchase from the state. These statutes are based on the idea that the state is the owner of the tidelands and has the right to dispose of them; that there are no rights of upland ownership to interfere with this power to dispose of them and convey private interest therein *except such as the state saw fit to give the adjacent owners* and to acknowledge in them and their grantees when they had dealt with such tidelands as private property,

subject, of course, to the paramount right of navigation secured to the public. These statutes have been largely acted upon and many titles acquired under them to tidelands. In the various questions which have come before the judiciary the validity of these statutes has been recognized and taken for granted, though not directly passed upon." (*Italics ours.*)

The right to the use of the shore land by the upland owner generally has been considered to be more extensive than mere ingress and egress.

"Legislative authority to extend wharves to the channel of the river was held equivalent to granting a possessory title, if not an absolute interest in the soil."

Hamlin v. Paripoint Mfg. Co., 141 Mass. 51, 57.

"And if an owner makes a filling or an obstruction in the waters in front of his land, the owner of the adjacent upland may enjoin its continuance or recover in trespass, if not in ejectment."

Union Depot Co. v. Brunswick, 31 Minn. 297.

The title to the shore land in Minnesota was in the State, but nevertheless, regardless of the necessity of use of the shoreland, the upland owner

was granted relief against the obstruction placed on the tideland.

“It is true the right of access and communication with the navigable water belongs exclusively to the riparian owner except with his permission.”

Miller v. Menhenhall, 19 Am. St. Rep. 225

“In many instances, however, right of entry or easement of passage may be found entirely unnecessary, the occupant having other means of reaching the *locus in quo*.”

Miller v. Mendenhall, *supra*.

“The right of the riparian owner to use and enjoy the improvements made by him in navigable waters fronting on his lands is not, it seems, limited to purposes connected with the actual use of the navigable water, but may extend to any purpose not inconsistent with the public rights.”

Hanford v. St. Paul & D. R. R. Co., 43 Minn. 104.

The law recognizes a right of proprietorship over the tideland.

“But a third person has no right to erect a wharf on land below high water mark on navigable waters without permission of the owner of the adjoining fast land.”

Ball v. Slack, 30 Am. Dec. 278

The littoral and riparian rights of the appellant in the case at bar are property rights.

“This riparian right is property and is valuable, and though it must be enjoyed in due subjection to the rights of the public, it cannot be arbitrarily or capriciously *destroyed or impaired*. It is a right of which when once vested the owner can only be deprived in accordance with established law and, if necessary that it be taken for the public good, upon due compensation.”

Yates v. Milwaukee, 10 Wall. 497

Appellees are mere squatters and have no right whatever to occupy the tideland in front of appellant's upland.

“But though the title is nominally in the state, the common right of the people is limited to ways of public use for the purposes of navigation and fishery, and the riparian owners are permitted to enjoy the remaining rights and privileges in the soil under water beyond their straight boundary lines after conceding to the state all the public rights.”

Gould on Waters, Sec. 168

In view of the reasons herein assigned, the law concerning tideland in Alaska and in the

United States generally holding that the littoral right is a property right, and of the obvious fact that this property right cannot be enjoyed by the upland owner, to whom it is a natural right, in conjunction with every person who desires to squat on the tideland and erect cabins and structures of various descriptions, we respectfully submit the judgment rendered by the trial court should be reversed and the relief sought by appellant granted.

Respectfully submitted,

CHENEY & ZEIGLER,

Attorneys for Appellant.

UNITED STATES

Circuit Court of Appeals

For the Ninth Circuit

CYRUS F. SHELDON,

Appellant,

vs.

GUS MESSERSCHMIDT, CHARLES
QUACKENBUSH and the JUNEAU
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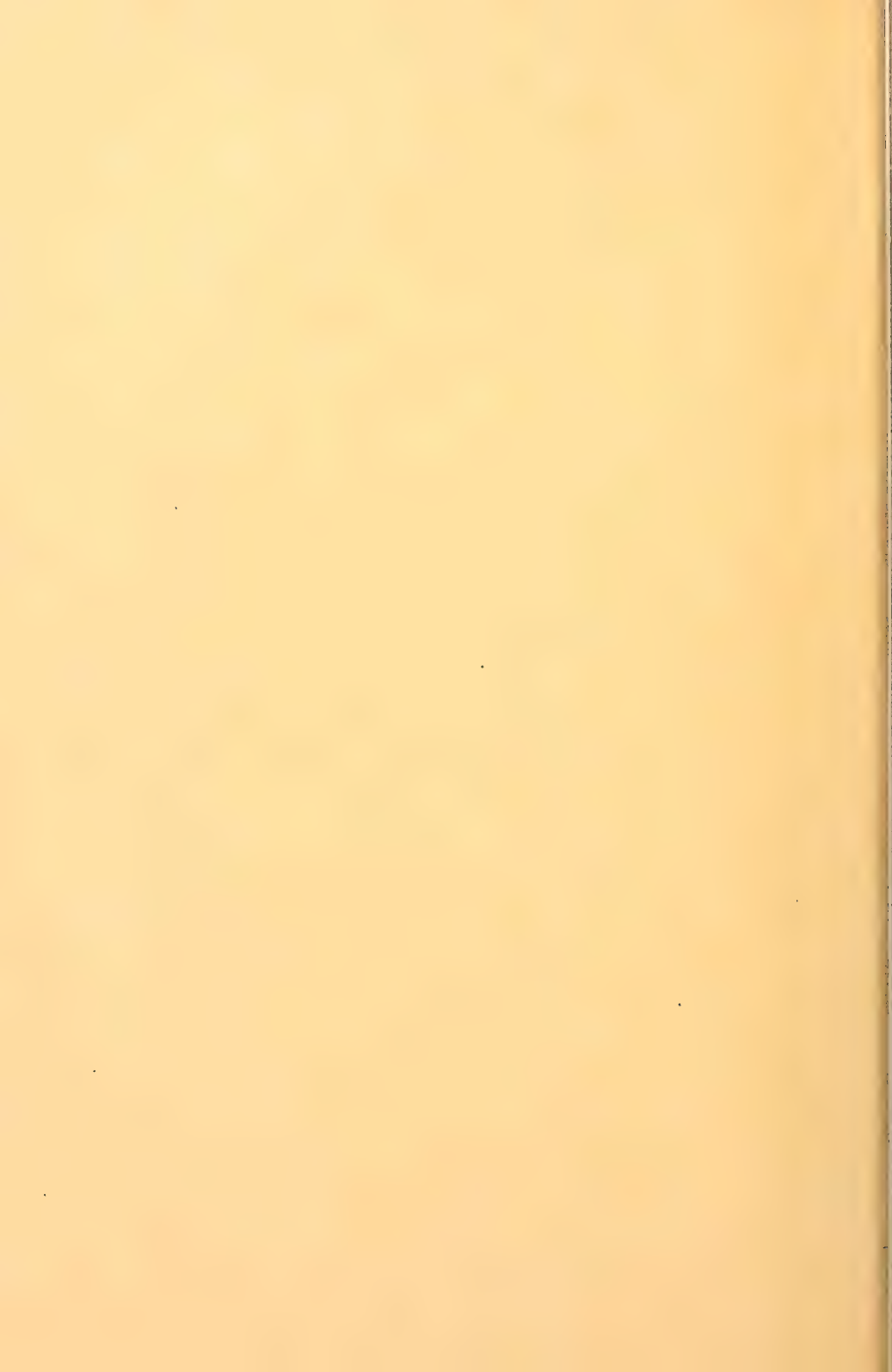
Appellees.

Brief of Appellees

Upon Appeal from the United States District
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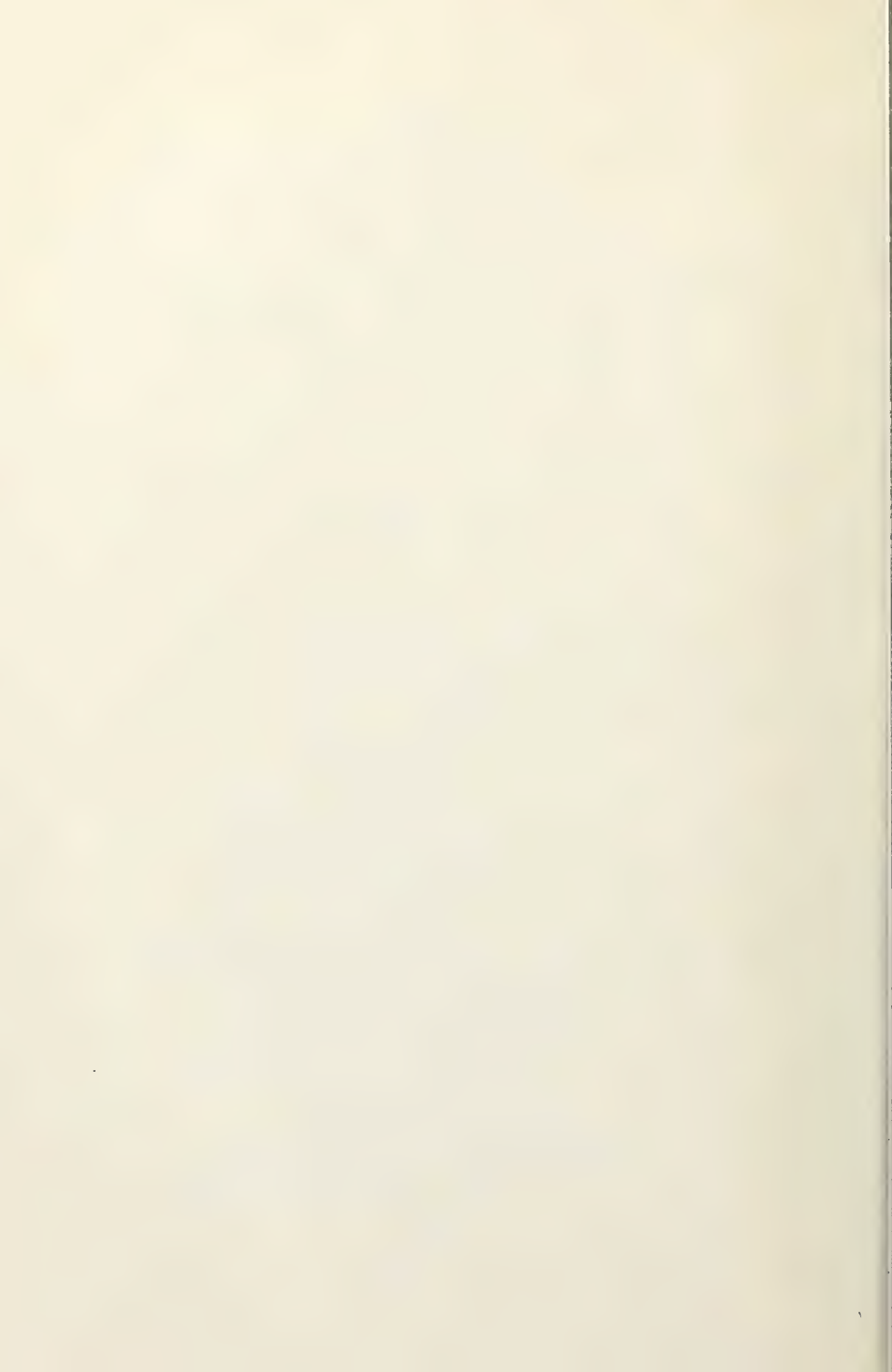
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STATEMENT OF FACTS

This suit was brought by the appellant, Cyrus F. Sheldon, to enjoin the maintenance of certain improvements placed by the defendants upon the tide lands lying in front of land claimed by the plaintiff, which tide lands are situate a short distance northerly from the town of Juneau, Alaska; in the complaint it is alleged that the plaintiff is the owner of certain uplands; that the defendants have placed piling and structures upon said tide lands and have thereby deprived the plaintiff of his right of ingress and egress to and from said upland to and from the navigable waters of Gastineau Channel; in the answer the defendants deny all of the allegations contained in the complaint and by way of new matter aver that the structures referred to in the complaint as being built by them are on the tide flats of Gastineau Channel below the line of mean high tide; that said structures and premises do not interfere with plaintiff's right of ingress to and from deep water of Gastineau Channel; that the plaintiff has never used his right of ingress and egress to and from deep water and that the defendants are informed and believe, and there-

fore allege, that the plaintiff does not intend to use said right of ingress and egress.

To this answer a demurrer was filed on the ground that it does not state facts sufficient to constitute a defense (record page 9), which demurrer was overruled (record page 10). The overruling of which is assigned as the first error.

To this answer a reply was filed, denying that all of the structures referred to in the complaint were below the line of mean high tide and denying that the same did not interfere with the plaintiff's right of ingress and egress.

The reply further challenges the sufficiency, as a matter of law, of the other allegations of said affirmative defense being the allegations, in which it is averred that the plaintiff has never used his right of ingress and egress and that plaintiff does not intend to use said right of ingress and egress. (record page 11.)

Upon the issues thus made by the pleadings, the case came to trial, at which the plaintiff offered testimony tending to show that he was the owner of 47.34 acres of land bordering on Gastineau Channel, and that defendants' structures were on the tide lands in front thereof, the official plat of which was received in evidence, marked plaintiff's Exhibit "D" and is found on page 39 of the printed record, from which it appears that plaintiff claims to be the owner of upland having a water frontage on Gastineau Channel of 31.20 chains, 2,065.14 feet.

From the evidence offered, it appears that defendants' structures extend over about 177 feet of appellant's frontage, (record pages 25 and 26) that the plaintiff resides on his land, except during the time he is doing his assessment work (record page 28) and that the only improvements in the way of buildings or structures upon said land owned by the plaintiff is the house in which he resides, which is marked "Sheldon's House" on said Exhibit "D" (record page 26). That the tide lands on which the structures were built by the defendants are situate about 700 or 800 feet southeasterly from said plaintiff's house (record page 27); that the uplands adjoining the tide lands in dispute are wild, unimproved lands, on which the timber has been slashed but from which the stumps and under brush have not been removed (record pages 27 and 30).

The evidence is not plain as to whether or not all of the structures are entirely upon the tidelands but since this action was brought for tide lands and as a court of equity would have no jurisdiction to dispossess a person from uplands, it becomes unnecessary for us to consider if any structures were placed above the line of mean high tide.

The plaintiff did not offer any evidence tending to show that he had any use for any of the tide lands lying in front of the said uplands or that he ever intended to make any use of said tide lands or any part thereof. Finding in Judgment (record page 13).

At the close of the testimony the defendants moved for a non-suit on the ground that the plaintiff had not offered any evidence to show that the defendants' structures interfere with plaintiff's right of ingress and egress and that plaintiff had not shown any necessity for the use of his right of ingress and egress (record page 30) which motion was granted (record page 31). The granting of which motion has been assigned as the second error.

Whereupon the court made a finding that plaintiff had introduced no evidence that defendants had interfered or were about to interfere with plaintiff's right of ingress and egress from or to the uplands to or from navigable water, nor that the plaintiff had used or is about to use his said right of ingress and egress and decreed that the cause be dismissed, which said finding above referred to was incorporated into and made a part of the judgment in the above entitled cause (record page 13), the making and entering of which judgment and decree is assigned as the third and last error made by the court in the said cause.

ARGUMENT AND AUTHORITIES

In the affirmative answer the defendants allege that the plaintiff has never used and does not intend to use said right of ingress and egress. This allegation is not denied in the reply, and is, therefore, admitted by the plaintiff and is equal to a finding of fact.

Fush vs. East Portland, 6 Ore. 282;

Jennings vs. Frazier, 80 Pac. 1011.

The only issue raised by the pleadings are:

First: Whether or not the plaintiff is the owner of the upland described in the complaint, on which issue no finding was requested and no finding was given and no finding was necessary to sustain the judgment.

Second: Whether or not the defendants' structures interfere with the plaintiff's right of ingress and egress as stated in the complaint, upon which issue the court made a finding that there was no evidence showing that defendants have interfered with, or are about to interfere with plaintiff's said right or ingress and egress, which finding is included in the judgment aforesaid and to which finding no exception was taken. Therefore, whether or not the same is supported by the evidence cannot be considered.

The evidence, however, clearly justifies and supports said finding and this finding, under the case of *Barron vs. Alexander*, 206 Fed. 272, is sufficient to support the judgment.

The title to shore land in the territory of Alaska has been expressly reserved by Congress for the future state, by part of section 1 and the last proviso of section 2 of the Act of May 14, 1898, which are as follows:

"That no entry shall be allowed extending more than eighty rods along the shore of any navigable water and along such shore a space

of at least eighty rods shall be reserved from entry between all such claims and that nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district. And it is further provided that no homestead shall exceed eighty acres in extent."

"That nothing in this act contained shall be construed as impairing in any degree the title of any state that may hereafter be erected out of said district or any part thereof to tide lands and beds of any of its navigable waters, or the right of such state to regulate the use thereof nor the right of the United States to resume possession of such lands, it being declared that all such rights shall continue to be held by the United States in trust for the people of any state or states why may hereafter be erected out of said district."

The appellant, as a littoral owner, has no property right in the soil of the fore shore or tide lands abutting his upland, the littoral owner's right being the right of ingress and egress, which is a privilege without profit, which the littoral proprietor has a right to enjoy in respect to his upland in and over the fore shore or tide lands the property of all the people by reason whereof the latter are obliged to suffer or refrain from doing something on their own property for the advantage of the littoral owner, a charge upon the property of the people for the benefit of the littoral proprietor.

The right of the littoral proprietor is an easement, being a liberty or privilege in the land of the public existing distinct from the ownership of the soil.

“The owner of the uplands cannot exercise his easement or right of access to the channel in such a way as to prevent other parties to whom the sovereign has granted the bed of the river or some portion of it, from using their own property in a reasonable way. The earned by the general rules of law applicable to easements and servitudes generally.”

Hedges vs. West Shore R. R. Co. 44 N. E.

691.

We will consider this right of the appellant,

First: With reference to the law of easements in general; and,

Second: With reference to his particular right of ingress and egress to and from his upland to and from navigable water.

UNDER THE LAW OF EASEMENTS IN GENERAL.

Nothing passes from the servient estate but what is requisite to the fair enjoyment of the easement, and, notwithstanding the existence of an easement, the owner of the dominant estate retains the right of full dominion and use of his land except insofar as his use is limited by a reasonable use of the easement. This right need not be expressly reserved for it is not granted. The owner

of the servient estate must use his estate in such a manner as to not prevent or interfere with the reasonable enjoyment of the easement.

Smith Canal or Ditch Co. vs. Colorado Ice Co. 82 Pac. 940;

3 L. R. A. (N. S.) 1148, and note;
also note 100 Am. Dec. 118.

What may be considered a proper and reasonable use of the owner of the fee as distinguished from an unreasonable and improper use, as well as what may be necessary to the beneficial use and enjoyment of the easement, are questions of fact to be determined by the trial court or jury and which necessarily depend largely upon the extent and lawful mode of user of the particular easement.

Harvey vs. Crane, 85 Mich. 316; 48 N.W. 582;

note 48 L. R. A. (N. S.) 87, 89;
Cooley Const. Lim. Sec. 691.

The owner of the servient estate over which there exists an easement of a right of way is not precluded from building over said right of way or tunnelling underneath the same, as long as he does not prevent or interfere with the reasonable use of the right of way.

Bitella vs. Lipsin, 80 Conn. 497;

69 Atl. 21;

16 L. R. A. (N.S.) 193 and note;

Notes 88 Am. Dec. 281; 100 Am. Dec. 118;

3 L. R. A. (N.S.) 463.

The owner of a servient estate over which there exists an easement, which is not susceptible of the use for which it was dedicated, will not be restrained by injunction, since there can be no injury to such easement.

2 *Beach Equity Jurisprudence* Sec. 713 and cases cited.

If the person entitled to the use of an easement has other convenient means of access and will not suffer material damages, equity will not interfere.

2 *Beach Injunction*, Sec. 1017 and cases cited.

And owner of land to which an easement is appurtenant cannot enjoin the maintenance of obstructions to said easement if he is out of possession of the land to which the easement is appurtenant, since he has no use for the easement.

Walker vs. Clifford, 29 S. 588;

128 Ala. 67;

86 Am. St. Rep. 74.

The owner of an easement, under which he is given a right to go on the servient estate when necessary to repair his buildings, cannot enjoin the owner of the servient estate from erecting a building that will interfere with the right given under the easement without showing that it is necessary to repair his building.

Phipp vs. Johnson, 99 Mass. 26.

Likewise, the owner of a prior and first usufructary right to water who is not in a position

to make beneficial use of the water, cannot enjoin a person from using said water.

Nevada Canal Co. vs. Kidd, 37 Cal. 284, 310, 311, 319.

From the foregoing, it will appear that the owner of an easement which is obstructed, must show, before he is entitled to relief by injunction,

First: That he is the owner in possession of the dominant estate and that he has an easement which is appurtenant thereto;

Second: That he is desirous of using said easement;

Third: That the use contemplated to be made and the method of availing himself of the use is reasonable;

Fourth: That the reasonable use of his easement has been interfered with.

The appellant although having offered testimony tending to support the first of these requirements, having admitted by the pleadings that he is not desirous of using said easement, fails to comply with the second requirement and has wholly failed to show that the use contemplated to be made and his method of use was reasonable; and the court has found that he has failed to establish the fourth requirement by its finding that the plaintiff's ingress and egress had not been interfered with.

It is the enjoyment of easements that will be protected by injunction against encroachment or obstruction.

Therefore, it follows that since the appellant does not desire to use and enjoy his easement,

there is nothing for the court of equity to protect and there has been no infringement of appellant's right.

AS CONSIDERED WITH REFERENCE TO APPELLANT'S LITTORAL RIGHTS.

The owner of upland bordering on the shore, is entitled to a reasonable use of the tide lands lying between his upland and deep water in connection with his right of ingress and egress or access to deep water, for the purpose of navigation, but this right is an easement, which must be exercised reasonably and the public cannot be deprived of any right which is not reasonably necessary in connection with said right of ingress and egress or access.

In *Columbia Canning Co. vs Hampton*, 161 Fed. 60, this court on pages 64 and 65 said:

"It follows from these authorities that while the owner or locator of lands in Alaska which border upon navigable or tidal waters has, under the general law, the right of access to such waters for the purpose of navigation, he can acquire no right or title in the soil below high water mark, and he can have therefore no right of possession upon which he can base an action against an intruder whom he charges with interfering with and obstructing him in the erection and use of a structure upon the shore below such high water mark. He may have, however, a right of action against an in-

truder who places obstacles on the shore that prevent him from having access to the navigable waters; but that is not this case. The plaintiff does not charge that defendants' structure is a nuisance, or that the defendants are obstructing him in having access to the navigable waters of Lynn Canal. The charge is that defendants are erecting on the shore a structure of piles for a fish trap which will be an obstruction to a similar structure which the plaintiff had commenced to erect. This is not the statement of a cause of action under the general law relating to littoral rights, nor under any statute relating to the waters of Alaska to which our attention has been called."

In *Worthen Lumber Mills vs. Alaska Juneau Gold Mining Co.* 229 Fed. 966.

On page 970 this court said:

"The court below found that the appellee had need of access to the navigable waters of Gastineau Channel in connection with its mining plant on the upland, and that to avail itself of this right of access it was necessary to construct a wharf covering the whole space in front of said upland, or from the appellant's southerly line to the present Alaska Juneau wharf, and that all of said area is reasonable and necessary to be used in aid of the appellee's ingress and egress to and from such upland. The appellee having, as we found, the right of access to the navigable waters of the

channel, we are not convinced that the court below has by its decree accorded to it a greater or more extensive right than is reasonable under the circumstances."

It is said in the case of Coburn vs. Ames, 52 Cal. 398:

"Assuming as we do for the purpose of this decision that the riparian owner is entitled to wharf out to deep water, it is clear, we think, that this right is in the nature of a franchise or privilege, to be exercised or not by him at his election. He may never see fit to avail himself of the privilege; and it cannot be pretended that while declining to avail himself of his right to wharf out, he is, nevertheless, entitled to the possession of the land below high water mark on the theory that at some future time he may possibly change his mind and desire to erect a wharf. * * and might prevent others indefinitely from engaging in the enterprise. A theory which works this result cannot and ought not to be upheld. * * In this state there are numerous large landed estates, held in private ownership, which front for many miles on the shore of the ocean and on navigable bays and inlets within the ebb and flow of the tide; and if the doctrine were tolerated that each of these proprietors, while himself declining to erect and maintain the docks, piers and wharves which are necessary for the convenience of commerce, nevertheless,

in virtue merely of his riparian rights, might maintain ejections for all such structures erected by others, which, when recovered he might either demolish or close to use in aid of commerce, it is not difficult to see the disastrous consequences which would result from such a doctrine."

And the case of *Taylor vs. Commonwealth*, 47 S. E. 875 holds as follows:

"In the case before us the property of the plaintiff is used merely for farming purposes. There has not been erected, and as far as the record discloses there is no purpose to erect, any pier or wharf. She is engaged in no business requiring such access to the channel of the stream as cannot be fully enjoyed consistently with every right which the state has exercised, or which it has delegated to others. The commonwealth holds as trustee a vast body of land covered by the flow of the tide, precisely as in the case before us, for the benefit of her citizens. It is not only her right, but her duty, as such trustee, to render this property productive. Is it reasonable that the commonwealth, holding title to the soil, is to be wholly subordinated in the use of it to the use with which another is clothed merely by virtue of being an owner of the adjoining shore, when the rights of each and all can be fully protected without diminution and without hindrance? If the time should come when the river

front of the plaintiff shall be divided into lots, whose owners find it necessary to their profitable enjoyment to erect piers and wharves upon them if they engage in business which shall require exclusive access to the channel of the stream, it may be that a case could then be presented more meritorious than that which we have under consideration, and, in the light of changed conditions, the court may be again called upon to consider the respective rights of the riparian owners and those remaining in the commonwealth, or which have been granted by her to others." * * *

"In conclusion, we are of the opinion that the plaintiff has no title as riparian owner to the water between low water mark and the channel of the river, nor in the soil beneath it; that as riparian proprietor she has certain rights below low water mark as a right to build wharves and of access to the water and a right of way over it to the channel and other purposes which need not now be considered; * * * but that all of these rights may be enjoyed by her to the fullest extent without let or hindrance, diminuation or impairment by reason of the right or privilege granted to and exercised by the Colonial Water Company under the facts as discussed in the record. We are, therefore, of the opinion that there was no error in dismissing the plaintiff's bill, and the decree of the circuit court is affirmed."

In *Hedges vs. West Shore R. R. Co.* Supra, the court says, after stating the facts and the part heretofore quoted:

“The plaintiffs have not been deprived of a reasonable method of access under all of the circumstances and hence their riparian rights have not been invaded.”

We contend, therefore, that before a littoral proprietor is entitled to relief against one who occupies tide lands abutting his upland, he must show:

First: That he is a littoral proprietor;

Second: That he desires to use the tide lands in connection with his right of access to deep water for the purpose of navigation;

Third: That the use contemplated to be made and the method of availing himself of the use is reasonable; and,

Fourth: That his right of access has been interfered with .

APPELLANT'S ASSIGNMENTS OF ERROR

Error is assigned on account of the court overruling plaintiff's demurrer to the defendant's answer. This was a general demurrer for want of sufficient facts to the whole answer, including the answer in chief which was a general denial of the allegations of the complaint and since this demurrer is to the whole answer and includes the general denial it will not be seriously contended that it was not rightfully overruled.

The other two assignments of error, the one being to the granting of plaintiff's motion for non-suit and the third and last being to the giving and entering of a judgment, can be considered as one, since under section 1210 Compiled Laws of Alaska, which is as follows, to-wit:

“Whenever upon the trial it is determined that the plaintiff is not entitled to the relief claimed, or any part thereof, a judgment shall be given dismissing the action, and such judgment shall have the effect to bar another action for the same cause or any part thereof, unless such determination be on account of a failure of proof on the part of the plaintiff, in which case the court may, on motion of such plaintiff, give such judgment without prejudice to another action by the plaintiff for the same cause or any part thereof.”

We contend,

First: That although the appellant in the case at bar did offer testimony tending to show that he was a littoral proprietor, he has admitted by his reply that he does not desire to use the tide lands to reach deep water for any purpose;

Second: That the use of appellant's access at this particular place unexplained, considering that he owns 2065 feet of frontage as shown in the case at bar, is unreasonable and without equity;

Third: That he has wholly failed to show that his access has been interefered with; and that, therefore, the case should be affirmed.

APPELLANT'S BRIEF

In appellant's brief, page 5, your attention is directed to the notes and annotations given in connection with section 55 of the Compiled Laws of Alaska.

The first of these notes is undoubtedly the law and the second is held to be the rule. In *United States vs. Roth*, Al. 257. This opinion is the opinion of the *nisi prius* court and clearly in conflict with *Columbia Canning Co. v. Hampton*, *Supra*.

Gavagan vs. Crary, 2 Al. 370 is also cited, but this case does not involve any of the questions in dispute and there is no mention in the opinion of littoral or riparian rights.

The case of *McClusky v. Pacific Coast Co.* 160 Fed. 794 is also cited but clearly this case does not bear out the rule laid down in the last note. In said case this court held that the littoral proprietor was entitled to access only, and did not define the meaning of access, as it was not necessary for the decision of the case.

The annotators, as well as the attorneys for the appellant, have overlooked and failed to cite the case of *Columbia Canning Co. vs. Hampton*, *Supra*, decided by this court on April 7, 1908.

This case is on all fours with the case under consideration, the only difference being that in the Hampton case the question was raised by demurrer to the allegations in the complaint and in the case at bar by the proof and admissions in the pleadings. In the Hampton case the complaint averred that the

plaintiff was the owner of the uplands; that the defendants had built a structure on the tide lands between said uplands and deep water; that said structure interfered with a similar structure which the complainant intended to build upon said tide waters, allegations as to interference with access being absent in the Hampton case. In the case at bar it was admitted under the pleadings that complainant has never used and does not contemplate to use the tide lands. There is proof offered to show that plaintiff is a littoral proprietor and that platforms had been built on the tide lands between his upland and deep water, so, in the facts raised and in principle, the two cases are identical.

We will not take the time of the court by answering the other Alaska cases in detail, as we consider the matter in dispute fully settled by the Hampton case. The principles laid down in this case have been followed ever since by the trial court in this division of Alaska and the Ninth Circuit Court of Appeals.

Nor do we contend that *Yates vs. Milwaukee*, and *Shiveley v. Bowlby* do not in all respects clearly interpret the law which has been subsequently followed, but said cases are in full harmony with the position taken by the trial court.

The appellant attempts a statement defining the littoral proprietor's rights, in which he states that it is an easement, under which he has a right to occupy and use all of the tide lands included between two lines drawn from the boundary to deep water, which he limits by the phrase "used for the

purpose of ingress and egress" which statement of the rights thus limited is undoubtedly a fair statement of his right, except that it should be further limited that the right of ingress and egress should be used for the purpose of navigation in connection with his upland. But what is the advantage of making this broad statement and afterwards limiting it.

The appellant seems to have much difficulty in determining why the lower court granted the motion for a non-suit and does much speculation in this regard. (Appellant's brief, page 16.) The findings of fact incorporated in the judgment place this beyond all conjecture and clearly show that the court granted it for the reason that the defendants had not interfered with plaintiff's right of ingress and egress to and from deep water and for the further reason that plaintiff had never used said right of ingress and egress and did not intend to use said right of ingress and egress. This is admitted by the pleadings and the testimony shows that the only use that plaintiff makes and intends to make of his 47 acres of uplands is to reside thereon.

Appellant cites the case of *West Coast Improvement Co. v. Windsor*, 36 Pac. 341, as bearing out his contention. This case, however, arose under and was decided under a statute, being the tide land act of the State of Washington, passed in 1890, under which the littoral owners were given the first right to purchase the tide lands lying between

their uplands and deep water, except that where improvements had been placed upon tide lands by others than the littoral owners, which were used for the purpose of trade and commerce, the owners of such improvements were given the first right to purchase said tide lands; and the act further provided that the upland owners, as well as the possessors of such tide lands, should be protected in their right to enjoy their possession; and the excerpts quoted from said case were prefaced by the following:

“Such being the situation and rights of the respondent, we think that a fair interpretation of the statute will show that it was the intent of the law making power that—”

The appellant further cites *Miller vs. Mendenhall*, 19 Am. St. Rep. 219, which is a Minnesota case and may, therefore, be considered in connection with the case of *Union Depot and Transfer Co. vs. Brunswick*, 31 Minn. 297; 17 N. W. 626, as well as the case of *Hanford vs. St. Paul* 43 Minn. 104.

In connection with these cases, it must be borne in mind that in the State of Minnesota there are no tidal waters, all the waters in the State of Minnesota being either rivers such as the Mississippi or waters of Lake Superior, and that in the State of Minnesota the riparian proprietor, for such he is, takes to low water and therefore, has an absolute title to the shore, this being directly op-

posite to the rule in Alaska and this is so regardless of the statement in appellant's brief, that the title to shore lands in Minnesota was in the state. (Appellant's brief, page 31.)

In the case of *Union Depot vs. Brunswick*, *Supra*, on page 628, the court says:

"In this state it is the settled doctrine that the riparian owner has the fee to *low water mark*."

Schurmerier vs. R. R. Co. 10 Minn. 92 (Gill 59);

Brisbine vs. R. R. Co. 23 Minn. 114."

In the same case, with reference to the right of access, the court said:

"It must be understood as giving him the right to do so to the extent necessary to make his abutting property reasonably available at any ordinary stage of the water for the kind of navigation for which the stream is used."

We concede the doctrine as quoted from *Hanford vs. St. Paul* that the riparian owner has the right to enjoy the improvements made by him in navigable water not inconsistent with the public right; but contend that the right is not limited to the riparian owner.

Ball vs. Slack, 30 Am. St. Rep. 278, is a Pennsylvania case, in which state the rights of the upland or littoral proprietor depend largely upon the terms of the grant under which he obtained title to the land. The grant in consideration extended

to deep water, giving the littoral proprietor title to the shore, under which conditions, he would be entitled to the possession and control of said shore and entitled to remove a trespasser who placed obstructions thereon, unless the same were used in connection with the public right of navigation or fishing.

We are at a loss to know what law will be enacted in Alaska when it becomes a state—whether the future legislatures of Alaska or States of Alaska will enact a law or laws under which the mere occupant of tide lands will be given the first right to purchase from the state or whether the littoral owner will be given that right or whether, as in the State of Washington, the occupant having improvements made for the purpose of commerce and trade will be given that right. That is a matter of speculation which should not influence the court at this time.

We respectfully submit that the law applicable to the case at bar was laid down in the case of *Columbia Canning Co. v. Hampton*. That the same has been consistently followed by the trial courts in this division and by the Ninth Circuit Court of Appeals in the following cases:

Dalton vs. Hazlett, 182 Fed. 561;

Barron vs. Alexander, Supra.;

Worthen Lumber Mills vs. Alaska Juneau Gold Mining Co. Supra.

That the littoral proprietor's right of access in Alaska has been well defined and established ever

since the decision by this court of the Columbia Canning Co. vs. Hampton and that this cause should for the reasons hereinbefore stated be affirmed.

Respectfully submitted,

HELLENTHAL & HELLENTHAL.

Attorneys for Appellees. 12

